S. HRG. 98-1

# OCEAN SHIPPING ACT OF 1983



## HEARING



BEFORE THE

## SUBCOMMITTEE ON MERCHANT MARINE

OF THE

## COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

## S. 47

TO IMPROVE THE INTERNATIONAL OCEAN COMMERCE TRANSPORTATION SYSTEM OF THE UNITED STATES

FEBRUARY 2, 1983

**Serial No. 98-1**

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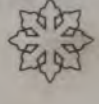
Committee on Commerce, Science, and Transportation



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# CONTENTS



## LIST OF WITNESSES



## ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

# OCEAN SHIPPING ACT OF 1983

WEDNESDAY, FEBRUARY 2, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON MERCHANT MARINE,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 253 of the Russell Senate Office Building, Hon. Ted Stevens (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Peter A. Friedmann, staff counsel; and John D. Hardy, minority staff counsel.

## OPENING STATEMENT BY SENATOR STEVENS

Senator STEVENS. Good morning. We are going to begin again the attempt to reform U.S. regulation of international ocean liner shipping. Our basis for discussion is S. 47, the Ocean and Shipping Act of 1983, which was introduced on the first day of the session by my good friend from the South, Senator Gorton, and Senator Packwood, Senator Inouye and myself.

I want to congratulate Slade, who preceded me as Merchant Marine Subcommittee chairman, here in this committee for the excellent work that he has done on this legislation in the last Congress. We want to build on that effort and we want to see some form of this legislation achieve final enactment soon in this Congress.

We should note that this is not a new topic. Since 1977 Congress has held 67 days of hearings on the various aspects of regulation dealing with S. 47. This is the 68th day and we think it is time to complete the task.

For the purposes of this morning's hearing, I want to ask each witness to briefly summarize his or her testimony. We will, of course, include in full your complete prepared statements for the record, and we will leave to judgment as to whether we will use this 5-minute bell. I think sometimes hearings go faster without them, so we will try to do our best to expedite this hearing.

I would say for the record and so that everyone will know, that we have discussed this bill with the majority leader. We are prepared to take it up the week of the 21st. Assuming there is no impediment to that action, we do intend to make it one of the first orders of business in the Senate this year.

It was passed by the House twice in the last Congress, and we believe it is possible to achieve the passage of a bill on this subject this year if we start early enough.

[The bill follows:]

98TH CONGRESS
1ST SESSION

# S. 47

To improve the international ocean commerce transportation system of the United States.

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IN THE SENATE OF THE UNITED STATES

JANUARY 26 (legislative day, JANUARY 25), 1983

Mr. GORTON (for himself, Mr. STEVENS, Mr. PACKWOOD, and Mr. INOUYE) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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# A BILL

To improve the international ocean commerce transportation system of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Shipping Act of 1983".

TABLE OF CONTENTS

**SEC. 2. DECLARATION OF POLICY.**

The objectives of United States regulation of international liner shipping are—

(1) to develop and maintain an efficient ocean transportation system through commercial means, with minimum government involvement, in order to serve the needs of United States foreign commerce;

(2) to foster reliable and responsible service by marine terminal operators, ocean common carriers, and conferences;

(3) to encourage ocean transportation rates and practices for United States exporters and importers that are internationally competitive, and which are not unjustly discriminatory;

(4) to harmonize United States shipping practices with those of its major trading partners;

(5) to permit cooperation among carriers and rationalization of services; and

(6) to facilitate efficient and timely regulation by a single Federal agency of the various aspects of international liner shipping, responsive to the growth of ocean

commerce and international developments affecting that commerce.

SEC. 3. DEFINITIONS.

As used in this Act—

(1) "agreement" means an understanding, arrangement, or association, written or oral, and any modification or cancellation thereof; but the term does not include a maritime labor agreement;

(2) "antitrust laws" means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; the Antitrust Civil Process Act (76 Stat. 548), as amended; and amendments and Acts supplementary thereto;

(3) "assessment agreement" means an agreement, whether part of a collective-bargaining agreement or negotiated separately, only to the extent that it provides for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized;

(4) "bulk cargo" means cargo that is loaded and carried in bulk without mark or count;

(5) "Commission" means the Federal Maritime Commission;

(6) "common carrier" means a person holding itself out to the general public to provide transportation of passengers or property between the United States and a foreign country for compensation that—

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between ports in the United States and ports in foreign countries.

(7) "conference" means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, or transshipment arrangement;

(8) "controlled carrier" means an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by the government under whose registry the vessels of the carrier operate;

ownership or control by a government shall be deemed to exist with respect to any carrier if—

(A) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier;

(9) "deferred rebate" means a return by a common carrier of any portion of the freight money to a shipper as a consideration for that shipper giving all, or any portion, of its shipments to that or any other common carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement;

(10) "fighting ship" means a vessel used in a particular trade by an ocean common carrier or group of such carriers for the purpose of excluding, preventing,

or reducing competition by driving another ocean common carrier out of that trade;

(11) "forest products in an unfinished or semifinished state" means forest products that require special handling moving in lot sizes that range from being too large for containers up to and including shipload lot sizes, including, but not limited to lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls, and paper in rolls;

(12) "inland division" means the amount paid by an ocean common carrier to any inland carrier for the inland portion of through transportation offered to the public by the ocean common carrier;

(13) "inland portion" means the charge to the public by an ocean common carrier with respect to the nonocean portion of through transportation;

(14) "loyalty contract" means a contract with an ocean common carrier or conference, other than a service contract or a contract based on time-volume rates, by which a contract shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference;

(15) "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier;

(16) "maritime labor agreement" means a collective-bargaining agreement between an employer or group of employers, subject to this Act and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group; but the term does not include an assessment agreement;

(17) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation service is provided, and is a shipper in its relationship with an ocean common carrier;

(18) "ocean common carrier" means a vessel operating common carrier; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp;

(19) "ocean freight forwarder" means a person in the United States who—

(A) dispatches shipments via common carriers and books or otherwise arranges space for such cargo on behalf of shippers, and

(B) processes the documentation or performs related activities incident to such shipments;

(20) "person" includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country;

(21) "service contract" means a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party;

(22) "shipment" means all of the cargo carried under the terms of a single bill of lading;

(23) "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made;

(24) "shipper's council" means an association of shippers or their agents, other than ocean freight forwarders and non-vessel-operating common carriers;

(25) "tariff" means any schedule of rates, charges, classifications, rules, and practices, including any supplement, amendment or reissue pertaining to services or accommodations subject to this Act;

(26) "through rate" means the single amount charged by a common carrier in connection with through transportation;

(27) "through transportation" means continuous transportation between origin and destination for which a single amounts is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port; and

(28) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

**SEC. 4. AGREEMENTS WITHIN SCOPE OF ACT.**

(a) OCEAN COMMON CARRIERS.—This Act applies to agreements by or among ocean common carriers to—

(1) discuss, fix, and regulate rates, accommodations, and other conditions of service including through rates and through transportation,

(2) pool or apportion traffic, revenues, net losses, or net profits;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers

(6) control, regulate, or prevent competition in international ocean transportation and,

(7) consult and confer with shippers and shippers' councils regarding general rate levels, charges, classifications, rules, practices, or services.

(b) MARINE TERMINAL OPERATORS.—This Act applies to agreements among marine terminal operators, and to agreements among one or more marine terminal operators and one or more ocean common carriers to—

(1) discuss, fix, and regulate rates and other conditions of services;

(2) pool or apportion earnings, losses, or traffic; and

(3) engage in exclusive, preferential, or cooperative working arrangements.

(c) SHIPPERS' COUNCILS.—Shippers may establish shippers' councils in order to—

(1) mutually consult and exchange information or views regarding rates, charges, classifications, rules, practices, or services;

(2) agree upon common positions;

(3) consult and confer with any ocean common carrier or conference regarding general rate levels, charges, classifications, rules, practices, or services; and

(4) consolidate cargo and negotiate time-volume and service contracts with ocean common carriers.

(d) ACQUISITIONS.—This Act does not apply to an acquisition by any person, directly or indirectly, of any voting security or assets of any other person.

**SEC. 5. AGREEMENTS.**

(a) FILING REQUIREMENTS.—A true copy of every agreement entered into with respect to an activity described in section 4 shall be filed with the Commission, except agree-

ments related to transportation to be performed within or between foreign countries. In the case of an oral agreement, complete memorandum specifying in detail the substance of the agreement shall be filed. The Commission may by regulation prescribe the general form and manner in which agreements shall be filed.

(b) NOTICE AND REJECTION.—Within 10 working days after an agreement is filed, the Commission shall transmit a notice of its filing to the Federal Register for publication. The Commission within thirty days after filing reject any agreement that on its face fails to comply with this section. In rejecting an agreement, the Commission shall state, in writing, the deficiency or deficiencies that caused the Commision to reject the agreement.

(c) CONFERENCE AGREEMENTS.—Each conference agreement must—

(1) state its purpose and the manner in which it will be implemented;

(2) provide reasonable and equal terms and conditions for admission and readmission to conference membership of any ocean common carrier willing to serve the particular trade or route;

(3) permit any member to withdraw from conference membership upon reasonable notice without penalty;

16-687 O—83——2

(4) require an independent neutral body to police fully the obligations of the conference and its members;

(5) provide for a consultation process designed to promote—

(A) commercial resolution of disputes; and

(B) cooperation in preventing and eliminating malpractices; and

(6) establish procedures for promptly and fairly considering shippers' requests and complaints.

(d) CONFERENCES UTILIZING LOYALTY CONTRACTS.—

(1) Each conference agreement must provide that, if the conference has in effect a loyalty contract with one or more shippers, any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 9 whenever—

(A) a member requests the conference to amend a rate or service item and announces its intention to take independent action if the conference does not agree to the amendment;

(B) the conference fails to adopt the proposed amendment within thirty days after the first consideration of the amendment in a conference meeting; and

(C) the member seeking the amendment requests the conference to include in the conference tariff a separate entry for its account as proposed in the amendment.

(2) Each conference agreement must further provide that, if the requirements of paragraph (1) are met, the conference shall include the proposed amendment in its tariff as the rate or service item of the proponent and any other members of the conference wishing to adopt the new rate or service item and that the new rate or service item shall become effective on publication and filing but no later than forty-five days after the initial request.

(e) INTERCONFERENCE AGREEMENTS.—Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier. Each agreement between conferences serving the same or different trades that would otherwise be naturally competitive must provide the right of independent action for each conference.

(f) SHIPPERS' COUNCIL AGREEMENTS.—Every shippers' council agreement must—

(1) limit membership to those shippers that have a direct financial interest in the export or import of the cargo covered by the agreement;

(2) provide that membership is voluntary;

(3) provide that the members have the right to act independently with any carrier or conference;

(4) provide for a consultation process designed to promote—

(A) commercial resolution of disputes;

(B) cooperation in preventing malpractice; and

(5) provide regular and orderly communication and exchange of information with conferences in their trade.

(g) ASSESSMENT AGREEMENTS.—

(1) Assessment agreements shall be filed with the Commission and shall be deemed approved upon filing. The Commission shall thereafter, upon complaint filed within two years of the date of filing of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports. The Commission shall issue its final decision in each proceeding within one year of the date of filing of the complaint. If an assessment or charge is found to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the

unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. These adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of any other section of this Act, the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, the provisions of this paragraph shall control.

(2) This Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, do not apply to maritime labor agreements. This section does not exempt from the provisions of this Act, the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, any rates, charges, regulations, or practices of a common carrier or marine terminal operator that are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement.

**SEC. 6. ACTION ON AGREEMENTS.**

(a) EFFECTIVE DATE.—Except with respect to assessment agreements, each agreement filed under section 5(a)

shall become effective forty-five days after filing, unless rejected under section 5(b) or suspended pursuant to subsection (b).

(b) SUSPENSION.—At any time prior to the expiration of the forty-five day period referred to in subsection (a), the Commission, upon complaint of a common carrier, shipper, or marine terminal operator, may suspend the effective date of an agreement pending the outcome of any proceeding pursuant to subsection (c), if the Commission, after preliminary hearing, finds that—

(1) the complainant has shown a reasonable probability that the agreement will operate in violation of sections 5 or 12; and

(2) the complainant will be substantially injured in the interim if the agreement is allowed to go into effect before a final decision on the merits.

No suspension period shall exceed one hundred and eighty days.

(c) CANCELLATION OR MODIFICATION.—The Commission may, at any time, upon complaint or upon its own motion, institute and conduct a hearing to determine if any agreement filed under section 5(a) operates in violation of section 5 or 12, and if so, shall by order, cancel or modify that agreement. Each agreement that is in effect at the time it is the subject of an investigation and hearing shall remain

in effect during the investigation and hearing, unless suspended pursuant to subsection (b).

(d) HEARING.—Hearings pursuant to this section shall be limited to the submission of affidavits of fact and memorandums of law unless, in the opinion of the Commission, there is a genuine issue of fact that requires an oral evidentiary hearing. Oral argument may be ordered at the discretion of the Commission.

(e) BURDEN OF PROOF.—The burden of proof in any proceeding under this section or under section 5(g)(1) is at all times on any party, including the Commission, opposing the agreement.

(f) COMPLIANCE WITH SUBPENA OR DISCOVERY.—In any proceeding under this section, the Commission may disapprove or cancel an agreement for failure of a proponent of the agreement to comply with a subpena or discovery order lawfully issued by the Commission.

(g) FINAL DECISION TIME.—The Commission shall issue a final decision in each hearing under this section within one hundred and eighty days of ordering the hearing. If, within this time period, the Commission determines that it is unable to issue a final order because of undue delays, the Commission may make a decision in the proceeding adverse to the delaying party on the basis of the delay, or in the case of undue delay caused by a proponent of an agreement, alter-

natively, toll the one-hundred-and-eighty-day period for the period of delay.

(h) DURATION OF EFFECTIVENESS.—Each agreement, once in effect, shall remain in effect until withdrawn or until canceled or modified by the Commission. The Commission may not limit the effectiveness of an agreement.

SEC. 7. LOYALTY CONTRACTS.

(a) CONTRACT REQUIREMENTS.—Any ocean common carrier or conference engaged in foreign commerce may utilize loyalty contracts, including contracts for through transportation, if—

(1) the contract is available to all shippers on equal terms and conditions and, where the contract covers service under through rates via a United States port or ports, it also offers the shipper an option of port-to-port contract service, and provides that use of either service shall satisfy the shipper's loyalty obligation;

(2) the contract shipper is permitted prompt release from the contract with respect to any shipment or shipments for which the contracting carrier or conference cannot provide space as requested on reasonable notice by the shipper;

(3) the contract provides that whenever a rate for the carriage of goods under the contract becomes effec-

tive, insofar as it is under the control of the carrier or conference, the rate—

(A) may not be increased on less than ninety days' notice, except upon agreement of the applicable shippers; and

(B) may be increased on not less than thirty days' notice if the increase is to a level no higher than that from which the particular rate was reduced within one hundred and eighty days immediately preceding the filing of the increase;

(4) the contract covers only those goods of the contract shipper as to the shipment of which it has the legal right at the time of shipment to select the carrier. It shall be deemed a breach of the contract if, before the time of shipment and with the sole intent to avoid its obligation under the contract, the contract shipper divests itself, or with the same intent permits itself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier that is not a party to the contract. In any dispute under this paragraph, the contract shipper has the burden of showing by a preponderance of the evidence that it is not in breach of the contract. No contract shall require the shipper to refuse to purchase, sell, or transfer any goods on terms

that vest the right to select the carrier in any other person;

(5) the contract shipper is not denied the right to utilize competing services that involve loading to or from a vessel at a port or points located beyond a carrier's or conference's geographic scope as defined in the contract;

(6) the damages recoverable for breach by either party are limited to actual damages to be determined after breach in accordance with the principles of contract law. The contract may specify, however, that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling;

(7) the shipper, carrier, or conference is permitted on ninety days' notice to terminate the contract rate system in whole or with respect to any commodity without penalty;

(8) the contract provides for a spread or series of spreads between non-contract rates and rates charged contract shippers that shall not exceed an aggregate of 15 per centum; and

(9) the contract excludes bulk cargo (except liquid bulk cargoes, other than chemicals, is less than full

shipload lots) and forest products in an unfinished or semifinished state.

(b) TREATMENT OF CONTRACT NOT IN CONFORMITY.—Utilization of a loyalty contract that does not conform with each of the requirements of this section is a violation exclusively of this Act.

**SEC. 8. EXEMPTION FROM ANTITRUST LAWS.**

(a) The antitrust laws do not apply to—

(1) any agreement or activity describedin section 4, whether or not filed and approved pursuant to sections 5 and 6, and whether or not exempted from any requirement of this Act pursuant to section 18;

(2) any loyalty contract or any activity pursuant to a loyalty contract;

(3) any agreement or activity that relates solely, to ocean or through transportation services within or between foreign countries, whether or not via the United States;

(4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade;

(5) any agreement or activity with a shipper's council organized under the laws of a foreign country and operating exclusively outside the United States,

even when that agreement or activity affects cargo transported in a United States import or export trade;

(6) any agreement or activity to provide or furnish wharfage, dock, warehouse, or other terminal facilities exclusively outside the United States; and

(7) subject to section 21(e)(2), any agreement, modification, or cancellation approved by the Commission before the effective date of this Act under section 15 of the Shipping Act, 1916, or permitted under section 14(b) thereof, and any properly filed and published tariff rate, charge, classification, rule, or practice implementing that agreement, modification, or cancellation.

(b) This Act does not extend antitrust immunity—

(1) to any agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to this Act with respect to transportation within the United States; or

(2) to any discussion or agreement among common carriers that are subject to this Act fixing the inland divisions (as opposed to the inland portions) of through rates within the United States.

(c)(1) Any determination by any agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) shall not remove or alter

the antitrust immunity for the period before the determination.

(2) No person may recover damages under section 4 of the Clayton Act, or obtain injunctive relief under section 16 of the Clayton Act, for conduct that is prohibited by this Act.

**SEC. 9. TARIFFS.**

(a) IN GENERAL.—

(1) Except with regard to bulk cargo and forest products in an unfinished or semifinished state, each common carrier and conference shall file with the Commission, and keep open to public inspection, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports or its own route and on any through transportation route that has been established. However, common carriers shall not be required to state separately or otherwise reveal in tariff filings the inland divisions of a through rate. Tariffs shall—

(A) plainly indicate the places between which cargo will be carried;

(B) list each classification of cargo in use;

(C) set forth the level of freight forwarder compensation, if any, by a carrier or conference;

(D) state separately each terminal or other charge, privilege, or facility under the control of

the carrier or conference and any rules or regulations that in any way change, affect, or determine any part or the aggregate of the rates or charges; and

(E) and include sample copies of any loyalty contract, bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

(2) Copies of tariffs shall be made available to any person and a reasonable charge may be assessed for them.

(b) TIME-VOLUME RATES.—Rates quoted in tariffs may vary with the volume of cargo offered over a specified period of time.

(c) SERVICE CONTRACTS.—An ocean common carrier or conference may enter into a service contract with a shipper or shippers council to provide specified services under specified rates and conditions, subject to the requirements of this Act. Each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and such essential terms shall be available to all shippers similarly situated. The essential terms shall include—

(1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(2) the commodity or commodities involved;

(3) the minimum volume;

(4) the line-haul rate;

(5) the duration;

(6) service commitments; and

(7) the liquidated damages for nonperformance, if any.

The exclusive remedy for a breach of a contract entered into under this subsection is an action in an appropriate court, unless the parties otherwise agree. This subsection does not affect service contracts relating to bulk cargo or forest products in an unfinished or semifinished state.

(d) RATES.—No new or initial rate or change in existing rate that results in an increased cost to the shipper may become effective earlier than thirty days after filing with the Commission. The Commission, for good cause, may allow such a new or initial rate or change to become effective in less than thirty days. Any change in an existing rate that results in a decreased cost to the shipper may become effective upon publication and filing with the Commission.

(e) REFUNDS.—The Commission may, upon application of a carrier or shipper, permit a common carrier or conference to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper if—

(1) there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and the refund will not result in discrimination among shippers, ports, or carriers;

(2) the common carrier or conference has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

(3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Commission may require, which gives notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and

(4) the application for refund or waiver is filed with the Commission within one hundred and eighty days from the date of shipment.

(f) FORM.—The Commission may by regulation prescribe the form and manner in which the tariffs required by this section shall be published and filed. The Commission may reject any tariff that is not in conformity with this section and its regulations. Upon rejection by the Commission, the tariff is void and its use is unlawful.

SEC. 10. CONTROLLED CARRIERS.

(a) CONTROLLED CARRIER RATES.—No controlled carrier subject to this section shall maintain rates or charges in its tariffs filed with the Commission that are below a level that is just and reasonable, nor shall any such carrier establish or maintain unjust or unreasonable classifications, rules, or regulations in such tariffs. An unjust or unreasonable classification, rule, or regulation means one which results or is likely to result in the carriage or handling of cargo at rates or charges which are below a level which is just and reasonable. The Commission may, at any time after notice and hearing, disapprove any rates, charges, classifications, rules, or regulations which the controlled carrier has failed to demonstrate to be just and reasonable. In any proceeding under this subsection, the burden of proof shall be on the controlled carrier to demonstrate that its rates, charges, classifications, rules,

or regulations are just and reasonable. Rates, charges, classifications, rules, or regulations filed by a controlled carrier that have been rejected, suspended, or disapproved by the Commission are void, and their use is unlawful.

(b) RATE STANDARDS.—For the purpose of this section, in determining whether rates, charges, classifications, rules, or regulations by a controlled carrier are just and reasonable, the Commission may take into account appropriate factors including, but not limited to, whether—

(1) the rates or charges which have been filed or which would result from the pertinent classifications, rules, or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade;

(2) the rates, charges, classifications, rules, or regulations are the same as or similar to those filed or assessed by other carriers in the same trade;

(3) the rates, charges, classifications, rules, or regulations are required to assure movement of particular cargo in the trade; or

(4) the rates, charges, classifications, rules, or regulations are required to maintain acceptable con-

tinuity, level, or quality of common carrier service to or from affected ports.

(c) EFFECTIVE DATE OF RATES.—Notwithstanding the provisions of section 9(d), the rates, charges, classifications, rules, or regulations of controlled carriers shall not, without special permission of the Commission, become effective sooner than the thirtieth day after the date of filing with the Commission. Each controlled carrier shall, upon the request of the Commission, file, within twenty days of request (with respect to its existing or proposed rates, charges, classifications, rules, or regulations), a statement of justification that sufficiently details the controlled carrier's need and purpose for such rates, charges, classifications, rules, or regulations upon which the Commission may reasonably base its determination of the lawfulness thereof.

(d) DISAPPROVAL OF RATES.—Whenever the Commission is of the opinion that the rates, charges, classifications, rules, or regulations filed by a controlled carrier may be unjust and unreasonable, the Commission may issue an order to the controlled carrier to show cause why such rates, charges, classifications, rules, or regulations should not be disapproved. Pending a determination as to their lawfulness in such a proceeding, the Commission may suspend such rates, charges, classifications, rules, or regulations at any time before their effective date. In the case of rates, charges,

classifications, rules, or regulations that have already become effective, the Commission may, upon the issuance of an order to show cause, suspend such rates, charges, classifications, rules, or regulations on not less than sixty days' notice to the controlled carrier. No period of suspension under this subsection may be greater than one hundred and eighty days. Whenever the Commission has suspended any rates, charges, classifications, rules, or regulations under this subsection, the affected carrier may file new rates, charges, classifications, rules, or regulations to take effect immediately during the suspension period in lieu of the suspended rates, charges, classifications, rules, or regulations—except that the Commission may reject such new rates, charges, classifications, rules, or regulations if it is of the opinion that they are unjust and unreasonable.

(e) PRESIDENTIAL REVIEW.—Concurrently with the publication thereof, the Commission shall transmit to the President any order of suspension or final order of disapproval of rates, charges, classifications, rules, or regulations of a controlled carrier subject to this section. Within ten days after the receipt or the effective date of such Commission order, the President may request the Commission in writing to stay the effect of the Commission's order if he finds that such stay is required for reasons of national defense or foreign policy which reasons shall be specified in the report.

Notwithstanding any other provisions of law, the Commission shall immediately grant such request by the issuance of an order in which the President's request shall be described. During any such stay, the President shall, whenever practicable, attempt to resolve the matter in controversy by negotiation with representatives of the applicable foreign governments.

(f) EXCEPTIONS.—The provisions of this section shall not apply to—

(1) any controlled carrier of a state whose vessels are entitled by a treaty of the United States to receive national or most-favored-nation treatment;

(2) any controlled carrier of a state which, on the effective date of this section, has subscribed to the statement of shipping policy contained in note 1 to annex A of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development;

(3) rates, charges, classifications, rules, or regulations of any controlled carrier in any particular trade which are covered by an agreement effective under section 6, other than an agreement in which all of the members are controlled carriers not otherwise excluded from the provisions of this subsection;

(4) rates, charges, classifications, rules, or regulations governing the transportation of cargo by a controlled carrier between the country by whose government it is owned or controlled, as defined herein and the United States; or

(5) a trade served exclusively by controlled carriers.

SEC. 11. OCEAN FREIGHT FORWARDERS.

(a) LICENSE.—No person may act as an ocean freight forwarder unless that person holds a license issued by the Commission. The Commission shall issue a forwarder's license to any person who—

(1) the Commission determines to be qualified by experience and character to render forwarding services; and

(2) furnishes a bond in a form and amount determined by the Commission to insure financial responsibility that is issued by a surety company found acceptable by the United States Department of the Treasury.

(b) SUSPENSION OR REVOCATION.—The Commission shall, after notice and hearing, suspend or revoke any license if it finds that the ocean freight forwarder is not qualified to render forwarding services or that it willfully failed to comply with any provision of this Act or with any lawful order, rule, or regulation of the Commission. The Commission may also

revoke a forwarder's license for failure to maintain a bond in accordance with subsection (a)(2).

(c) EXCEPTION.—A person whose primary business is the sale of merchandise may forward shipments of that merchandise for its own account without a license.

(d) COMPENSATION OF FORWARDERS BY CARRIERS.—

(1) A common carrier may compensate an ocean freight forwarder in connection with any cargo shipment dispatched on behalf of others only when the ocean freight forwarder has certified in writing that it holds a valid license and has performed the following services:

(A) engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space; and

(B) prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the cargo.

(2) No common carrier may pay compensation for services described in paragraph (1) more than once on the same cargo shipment.

(3) No compensation may be paid to an ocean freight forwarder except in accordance with a tariff filed under section 9(a).

(4) No ocean freight forwarder may receive compensation from a common carrier with respect to any shipment in which the forwarder has a direct or indirect beneficial interest nor shall a common carrier knowingly pay compensation on any such shipment.

**SEC. 12. PROHIBITED ACTS.**

(a) IN GENERAL.—No person may—

(1) operate under an agreement described in section 4 that has not become effective under section 6, or that has been suspended, disapproved, or canceled;

(2) operate under an agreement described in section 4 except in accordance with its terms and any modifications to the agreement made by the Commission; or

(3) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false measurement, false report of weight or measures, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable;

(b) COMMON CARRIERS.—No common carrier, including a joint venture, either alone or in conjunction with any other person, directly or indirectly, may—

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are specified in its tariffs;

(2) rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with its tariffs;

(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs;

(4) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means;

(5) retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;

(6) make any unfair or unjustly discriminatory contract with any shipper or engage in any unfair or

unjustly discriminatory practice against any carrier, shipper, or port, in the matter of—

(A) rates or charges;

(B) cargo classifications;

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) the loading and landing of freight in proper condition; or

(E) the adjustment and settlement of claims;

(7) employ any fighting ship; or

(8) offer or pay any deferred rebates.

(c) CONCERTED ACTION.—No conference or group of two or more common carriers, other than a joint venture operating by itself, may collectively—

(1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;

(2) utilize a device or means that unreasonably sets conditions or otherwise unreasonably restricts the ability of a shipper to select an ocean common carrier in a competing trade, or an ocean tramp, or a bulk carrier;

(3) unreasonably restrict the employment of intermodalism or other technological innovations by member common carriers;

(4) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of an ocean common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier;

(5) negotiate with any nonocean carrier or group of nonocean carriers (for example, truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by such nonocean carriers: *Provided*, That this prohibition shall not prohibit the setting and publishing of a joint through rate by a conference, joint venture, or an association of ocean common carriers authorized to file tariffs;

(6) deny in the export foreign commerce of the United States compensation to an ocean freight forwarder or limit the amount thereof to less than one and one-fourth per centum of the freight charges;

(d) COMMON CARRIERS, OCEAN FREIGHT FORWARDERS, AND MARINE TERMINAL OPERATORS.—No common carrier, ocean freight forwarder, or marine terminal operator may—

(1) fail to establish, observe, and enforce just and reasonable regulations and practices relating to or con-

nected with receiving, handling, storing, or delivering property;

(2) make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(3) knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, ocean freight forwarder, or marine terminal operator consent of the shipper or consignee if that information—

(A) may be used to the detriment or prejudice of the shipper or consignee:

(B) may improperly disclose its business transactions to a competitor; or

(C) may be used to the detriment or prejudice of any common carrier.

Nothing in this paragraph shall be construed to prevent providing such information in response to any legal process, to the United States, or to any independent neutral body operating within the scope of its authority

to fulfill the policing obligations of the parties to an agreement effective under this Act. Nor shall it be prohibited for any ocean common carrier that is a party to a conference agreement approved under this Act, or any receiver, trustee, lessee, agent, or employee of such carrier or person, or any other person authorized by such carrier to receive information, to give information to the conference or any person, firm, corporation, or agency designated by the conference, or to prevent the conference or its designee from soliciting or receiving information for the purpose of determining whether a shipper or consignee has breached an agreement with the conference or its member lines or for the purpose of determining whether a member of the conference has breached the conference agreement, or for the purpose of compiling statistics of cargo movement, but the use of such information for any other purpose prohibited by this Act or any other Act shall be prohibited.

**SEC. 13. COMPLAINTS, INVESTIGATIONS, REPORTS, AND REPARATIONS.**

(a) FILING OF COMPLAINTS.—Any person may file with the Commission a sworn complaint alleging a violation of this Act and may seek reparation for any injury caused to the complainant by that violation.

(b) SATISFACTION OR INVESTIGATION OF COMPLAINTS.—The Commission shall furnish a copy of a complaint filed pursuant to subsection (a) to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order.

(c) COMMISSION INVESTIGATIONS.—The Commission upon its own motion may, in like manner and with the same powers, investigate any conduct that it believes may be in violation of this Act.

(d) REPORTS.—The Commission shall make a written report of every investigation made under this Act in which a hearing was held stating its conclusions, decisions, findings of fact, and order. A copy of this report shall be furnished to all parties. The Commission shall publish each report for public information and the published report shall be competent evidence in all courts of the United States.

(f) REPARATIONS.—For any complaint filed pursuant to subsection (a) within two years after the cause of action accrued, the Commission may, after notice and hearing and when appropriate, direct the payment of reparations to the complainant for actual injury caused by a violation of this Act.

**SEC. 14. SUBPENAS AND DISCOVERY.**

(a) IN GENERAL.—In investigations and adjudicatory proceedings under this Act—

(1) depositions, written interrogatories, and discovery procedures may be utilized by any party under rules and regulations issued by the Commission which rules and regulations, to the extent practicable, shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States; and

(2) the Commission may by subpena compel the attendance of witnesses and the production of books, papers, documents, and other evidence.

(b) WITNESS FEES.—Witnesses shall, unless otherwise prohibited by law, be entitled to the same fees and mileage as in the courts of the United States.

**SEC. 15. PENALTIES.**

(a) ASSESSMENT OF PENALTY.—Whoever violates any provision of this Act, any regulation issued thereunder, or any Commission order is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this Act, may not exceed $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation shall constitute a separate offense.

(b) TARIFF SUSPENSION.—

(1) For any violation of section 12(b) (1), (2), (3), (4), or (8), the Commission may suspend any or all tariffs of any common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, for a period not to exceed twelve months.

(2) For failure to supply information ordered to be produced or compelled by subpena under section 14, the Commission may suspend any or all tariffs of any common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member.

(3) Any common carrier who accepts or handles cargo for carriage under a tariff that has been suspended or after its right to utilize that tariff has been suspended shall be subject to a civil penalty of not more than $50,000 for each shipment.

(4) If, in defense of its failure to comply with a subpena or discovery order, a common carrier alleges that documents or information located in a foreign country cannot be produced because of the laws of that country, the Commission shall immediately notify the Secretary of State of the failure to comply and of the allegation relating to foreign laws. Upon receiving the notification, the Secretary of State shall promptly consult with the government of the nation within which

the documents or information are alleged to be located for the purpose of assisting the Commission in obtaining the documents or information sought.

(5) Before any tariff suspension ordered under this subsection becomes effective, it shall be immediately submitted to the President who may, within ten days after receiving it, disapprove the order if he finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.

(c) ASSESSMENT PROCEDURE.—The Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty.

(d) REVIEW OF CIVIL PENALTY.—Any person against whom a civil penalty is assessed under this section may obtain review under chapter 158 of title 28, United States Code.

(e) FAILURE TO PAY ASSESSMENT.—If any person fails to pay a civil penalty that has been assessed after it has

become final or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall seek to recover the amount assessed in any appropriate district court of the United States. In such an action, the court shall enforce the Commission's order unless it finds that the order was not regularly made or duly issued.

(f) LIMITATIONS.—

(1) No fine or other punishment may be imposed for criminal conspiracy to violate any provision of this Act, or to defraud the Commission by concealment of any such violation.

(2) Any enforcement action under this Act and any formal proceeding to assess any penalty under this section shall be commenced within five years from the date the violation occurred.

**SEC. 16. COMMISSION ORDERS.**

(a) IN GENERAL.—Orders of the Commission relating to any violation of this Act or any regulation issued thereunder shall be made, upon sworn complaint or on its own motion only after an opportunity for hearing. Each order of the Commission shall continue in force for the period of time specified in the order or until suspended, modified, or set aside by the Commission or a court of competent jurisdiction.

(b) REVERSAL OR SUSPENSION OF ORDERS.—The Commission may reverse, suspend, or modify any order made

by it, and upon application of any party to a proceeding may grant a rehearing of the same or any matter determined therein. No rehearing shall, except by special order of the Commission, operate as a stay of such order.

(c) ENFORCEMENT OF NONREPARATION ORDERS.—In case of violation of any order of the Commission, or for failure to comply with a Commission subpena, the Commission, or any party injured by such violation, or the Attorney General may seek enforcement by any United States district court having jurisdiction over the parties. If, after hearing, the court determines that the order was properly made and duly issued, it shall enforce the order by an appropriate injunction or other process, mandatory or otherwise.

(d) ENFORCEMENT OF REPARATION ORDER.—(1) In case of violation of any order of the Commission for the payment of reparation, the person to whom the award was made may seek enforcement of the order in any United States district court having jurisdiction of the parties.

(2) In any United States district court the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor for the costs of any subsequent stage of the proceedings, unless they accrue upon his appeal. A petitioner in a United States district court who prevails shall be allowed a

reasonable attorney's fee to be assessed and collected as part of the costs of the suit.

(3) All parties in whose favor the Commission has made an award of reparation by a single order may be joined as plaintiffs, and all other parties in the order may be joined as defendants, in a single suit in any district in which any one plaintiff could maintain a suit against any one defendant. Service of process against any defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, that defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

(e) STATUTE OF LIMITATIONS.—Any action seeking enforcement of a Commission order shall be filed within one year after the date of the violation of the order.

(f) REPRESENTATION IN COURT.—Attorneys employed by the Commission may, if the Attorney General, after appropriate notice, does not object, appear for and represent the Commission in any case before a court of the United States or a State of the United States.

(g) IMPACT REPORTS.—The Commission shall be exempt from the requirements for the preparation of impact reports pursuant to 42 U.S.C 6362(b).

**SEC. 17. REPORTS AND CERTIFICATES.**

(a) REPORTS.—The Commission may require any common carrier, marine terminal operator, or ocean freight forwarder, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report or any account, record, rate, or charge, or memorandum of any facts and transactions appertaining to the business of that common carrier, marine terminal operator, or ocean common carrier. The report, account, record, rate, charge, or memorandum shall be made under oath whenever the Commission so requires and shall be furnished in the form and within the time prescribed by the Commission. Conference minutes and self-policing reports required to be filed with the Commission under this section shall not be released to third parties or published by the Commission.

(b) CERTIFICATION.—The Commission shall require the chief executive officer of every ocean common carrier and, to the extent it deems feasible, may require any shipper, consignor, consignee, non-vessel-operating common carrier, marine terminal operator, ocean freight forwarder, or broker to file a periodic written certification made under oath with the Commission attesting to—

(1) a policy prohibiting the payment, solicitation, or receipt of any rebate that is unlawful under this Act;

(2) the fact that this policy has been promulgated recently to each owner, officer, employee, and agent thereof;

(3) the details of the efforts made within the company or otherwise to prevent or correct illegal rebating; and

(4) full cooperation with the Commission in its investigation of illegal rebating or refunds in United States foreign trades and in its efforts to end those illegal practices.

Failure to file a certification shall result in a civil penalty of not more than $5,000 for each day the violation continues.

SEC. 18. EXEMPTIONS.

The Commission, upon application or on its own motion, may by order or rule exempt for the future any specified activity or class of agreements subject to this Act from any requirement of this Act, if it finds that the exemption will not substantially impair effective regulation by the Commission. The Commission may attach conditions to any exemption and may, by order, revoke any exemption. No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons (who, for purposes of this section, include the departments and agencies of the United States).

**SEC. 19. REGULATIONS.**

The Commission may promulgate rules and regulations as necessary to carry out the provisions of this Act.

**SEC. 20. REPEALS AND CONFORMING AMENDMENTS.**

(a) REPEALS.—The laws specified in the following table are repealed:

| | |
|---|---|
| Shipping Act, 1916: | |
| Sec. 13 | 36 Stat. 117 |
| Sec. 14a | 46 U.S.C. 813 |
| Sec. 14b | 46 U.S.C. 813a |
| Sec. 18(b) | 46 U.S.C. 817(b) |
| Sec. 18(c) | 46 U.S.C. 817(c) |
| Sec. 26 | 46 U.S.C. 825 |
| Sec. 44 | 46 U.S.C. 8416 |
| Merchant Marine Act, 1920: | |
| Sec. 20 | 41 Stat. 996 |
| Merchant Marine Act, 1936: | |
| Sec. 212(e) | 46 U.S.C. 1122(e) |
| Sec. 214 | 46 U.S.C. 1124 |
| Omnibus Budget Reconciliation Act of 1981: | |
| Sec. 1608 | 95 Stat. 752 |

(b) CONFORMING AMENDMENTS.—The Shipping Act, 1916 (39 Stat. 728), as amended (46 U.S.C. 801 et seq.), is amended as follows:

(1) in section 1 by striking the definition "controlled carrier";

(2) in sections 14, 15, 16, 20, 21(a), 22, and 45 by striking "common carrier by water" wherever it appears in those sections and substituting "common carrier by water in interstate commerce";

(3) in section 14, first paragraph, by striking "or a port of a foreign country";

(4) in section 14, last paragraph, by striking all after the words "for each offense" and substituting a period;

(5) in section 15, fourth paragraph, by striking "(including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers)" and also "with the publication and filing requirements of section 18(b) hereof and";

(6) in section 15, sixth paragraph, by striking ", or permitted under section 14b," and in the seventh paragraph, by striking "or of section 14b";

(7) in section 16, in the paragraph designated "First", by striking all after "disadvantage in any respect" and substituting "whatsoever.";

(8) in section 17 by striking the first paragraph, and in the second paragraph, by striking "such carrier and every";

(9) in section 21(b) by striking "The Commission shall require the chief executive officer of every vessel operating common carrier by water in foreign commerce and to the extent it deems feasible, may require any shipper, consignor, consignee, forwarder, broker, other carrier or other person subject to this Act," and

substituting "The Commission may, to the extent it deems feasible, require any shipper, consignor, consignee, forwarder, broker, or other person subject to this Act,";

(10) in section 22 by striking subsection (c);

(11) in section 25, at the end of the first sentence, by adding "under this Act";

(12) in sections 29, 30, and 31, after the words "any order of the board", by adding "under this Act,";

(13) in section 32(a), by striking "and section 44"; and

(14) in section 32(c), after the words "or functions,", by adding "under this Act,".

(c) TECHNICAL AMENDMENTS.—Section 212 of the Merchant Marine Act, 1936 (46 U.S.C. 1122) is amended by—

(1) striking after subsection (d) the following undesignated paragraph:

"The Federal Maritime Commission is authorized and directed—";

and

(2) striking after subsection (e) the following undesignated paragraph:

"The Secretary of Transportation is authorized and directed—".

(d) EFFECTS ON CERTAIN AGREEMENTS AND CONTRACTS.—All agreements, contracts, modifications, and exemptions previously approved or licenses previously issued by the Commission shall continue in force and effect as if approved or issued under the provisions of this Act; and all new agreements, contracts, and modifications to existing, pending, or new contracts or agreements shall be considered under the provisions of this Act.

(e) SAVINGS PROVISIONS.—

(1) Notwithstanding section 9(c), each service contract entered into by a shipper and an ocean common carrier or conference before the date of enactment of this Act, may remain in full force and effect and need not comply with the requirements of that subsection until January 1, 1984.

(2) This Act and the amendments made by it shall not affect any suit at law filed before the date of enactment of this Act.

**SEC. 21. EFFECTIVE DATE.**

This Act shall become effective one hundred and eighty days after the date of its enactment, except that section 19 shall become effective upon enactment.

Senator STEVENS. Senator Inouye has an opening statement.

## OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. The Shipping Act of 1916 recognized that conferences and other agreements for economic cooperation among steamship operators in our international liner trades were necessary if those trades were to be stable and offer efficient, dependable service at fair prices. Accordingly, it provided immunity from our antitrust laws for these kinds of economic activity.

Because cartelization carried with it the real potential for abuse, however, the act also provided for Government control, principally through prior approval of these agreements.

Over the past 6 years this committee has held extensive hearings in an effort to determine if the regulatory scheme set out in the Shipping Act was in fact achieving its objectives.

During that time the committee has heard testimony from many experts who have the actual experience of competing in the real world of international liner shipping, and the responsibility for keeping their companies financially sound.

Their assessment of our present regulatory system has been near unanimous—through administrative action and judicial interpretation that system has become so cumbersome for the agency charged with administering it, and so burdensome to the operators who must comply with it, that it has failed to promote efficiency, stability, and predictability.

On two previous occasions this committee agreed, and unanimously recommended legislation to streamline the FMC's procedures, and reaffirm the antitrust immunity of ocean liner shipping operators. The expert agency charged with administering the law, and the administration have also agreed.

The need for maritime regulatory reform is pressing. In fact action is overdue. I would hope the committee and the Senate will move expeditiously to insure passage of legislation in this session.

Senator STEVENS. Do you have a statement, Mr. Gorton?

## OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. One of my highest priorities in the 97th Congress was to pass legislation to revise the Shipping Act, and it remains so in this new session of Congress. S. 47, the Shipping Act of 1983, like S. 1593, reaffirms the antitrust immunity Congress granted to international ocean carriers in the Shipping Act of 1916. It also streamlines the Federal Maritime Commission's regulatory role by providing a swift and predictable review process. At the same time that the bill strengthens conferences, it protects importers and exporters by defining prohibited activities clearly and by providing sanctions. The Shipping Act of 1983 will put the U.S.-flag carriers on an equal footing with foreign-flag competitors by conforming our laws more closely with those of our international trading partners.

There has been a consensus in both the House and the Senate, in the administration, and within the industry that reform in the Shipping Act is long overdue. Commerce Committee staff tells me that legislation on the issues in S. 47 has been the subject of 67

days of hearings since 1977. I hope today will be the last day of hearings necessary in the Senate.

Today we have representatives from the administration, from both large and small shippers, from carriers, and from those who have opposed the antitrust immunity for shippers in the past. I trust these balanced views will help us to produce the best legislation possible.

It is a privilege to have you with us here today.

Senator STEVENS. Thank you very much.

Senator Trible.

Senator TRIBLE. I would simply say, Mr. Chairman, as a new Member of the Senate and this committee and subcommittee, I am pleased to join you this morning. I applaud your efforts and the efforts of Senator Gorton in supporting this legislation in the past. I will look forward to working with you and the members of this committee in supporting responsible legislation that will help revitalize America's merchant marine. There is no higher national requirement.

Senator STEVENS. We are delighted to have you with us, Senator.

Our first witness this morning is Admiral Shear, the Maritime Administrator. Good morning, sir. We are happy to have you here.

Admiral, proceed as you wish, please, sir.

## STATEMENT OF ADM. HAROLD E. SHEAR, MARITIME ADMINISTRATOR, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY STUART BREIDBART, CHIEF COUNSEL, MARITIME ADMINISTRATION

Admiral SHEAR. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the Subcommittee on Merchant Marine, it is a very great pleasure to appear before you on behalf of the administration. I am accompanied today by Mr. Stuart Breidbart, Chief Counsel of the Maritime Administration.

Mr. Chairman, you and your colleagues are certainly to be commended for the prompt reintroduction of legislation which addresses the need for regulatory reform. It is abundantly clear that the United States faces difficult problems in the maritime area. The liner vessels are the core of the U.S.-flag merchant marine today, and it is necessary to overcome some of the regulatory handicaps currently confronting our liner operators.

As you are well aware, during the 97th Congress we in the administration worked closely with members of this committee in the development of regulatory legislation. I am pleased to inform you that the major objectives of the administration in this area remain the same. Our objectives continue to be: First, to minimize Government intervention in business; second, to maintain a strong U.S. merchant marine; and third, to put U.S. carriers on an equal footing with foreign carriers.

The President has pledged to reestablish the economic health of our merchant marine in order to support our commercial interests abroad and to meet the need for logistical support for national defense in time of emergency. Maritime regulatory reform is the cornerstone of the administration's maritime policy.

Restructuring the regulatory framework within which the ocean liner industry operates would be beneficial to the industry, to shippers and to the country as a whole. It is an important step toward the implementation of the President's commitment.

A reading of section 2, declaration of policy, of S. 47 confirms that the administration and the Congress are in agreement on the need for regulatory reform. We share the objectives of efficiency, reliability, competitive rates, and harmonization of U.S. shipping practices with the rest of the world. We must permit cooperation among carriers, rationalization of services, and facilitation of efficient and timely regulation by a single agency.

The precise way these objectives are carried out through legislation has been the subject of intense debate and action during the last Congress. Throughout that endeavor, Secretary Lewis led the administration's effort to understand the legitimate concerns of all, to accommodate them, and to support enactment of maritime regulatory reform legislation.

I have discussed this matter with Mrs. Dole, and I can assure you that Secretary Dole, as the new maritime spokesperson, intends to do the same. I am confident that we can build on these efforts to enact legislation.

There have been extensive and lengthy hearings, discussions, and negotiations among the representatives of ocean carriers, shippers, congressional committees, and the administration on these legislative efforts. A general consensus emerged in the 97th Congress with regard to the nature of the regulatory reforms that are necessary to make U.S. maritime policy consistent with international shipping practices.

The need to clarify the procedures which have made U.S. regulation of the liner industry unwieldy and unpredictable is clear. That consensus was reflected in the broad-based support which we witnessed last year. We need maritime reform legislation that will correct procedures presently followed in order to reinstate certainty and predictability in the regulation of liner shipping in our foreign commerce while adequately protecting all parties—shippers, carriers, and ultimately the American consumer.

The legislation must recognize the need for international comity in liner shipping. It must define with greater precision the scope of antitrust immunity which has been in force since passage of the Shipping Act of 1916. A more precise definition would provide greater clarity and certainty for operators and users of shipping services.

At the same time, such legislation will eliminate many of the problems which have arisen in connection with extraterritorial application of our laws to ocean liner services, which has produced friction with our trading partners. Please be assured of the administration's continuing cooperation in working toward the early enactment of such regulatory reform legislation.

That concludes my prepared statement, Mr. Chairman.

Before answering questions which you or other members of the subcommittee may have, with your permission I would like to read a letter from Secretary Lewis and ask that it be incorporated into the record.

This letter is addressed to Senator Stevens and reads as follows:

I am writing to you on my last day as Secretary of Transportation for two major purposes. The first is to express my appreciation for the extremely productive and cordial working relationship that we have had in the last two years, especially in the area of air traffic controllers' pay package, rail and maritime matters.

The second reason I am writing is to urge you and your committee members to continue to push for the passage of maritime regulatory reform legislation. While we were able to complete a tremendous amount of very important work last year, my biggest disappointment, and, I am sure, yours, is that time ran out before Senate passage of that legislation.

As you take up the latest version of maritime regulatory reform, S. 47, let me encourage you to continue your close working relationships with the executive branch. The President has assured me that the revitalization of the U.S. merchant marine remains high on his priority list. He has also reaffirmed that Elizabeth Dole, the new Secretary of Transportation will be the administration's spokesperson on maritime affairs. In my discussions with Mrs. Dole regarding the various maritime issues, she has indicated her intention to work closely with you and your committee to assure that our mutual objectives are met. I am confident that within a short time, the combined efforts of the Congress, the administration, the maritime industry and the shippers will result in the enactment of much needed legislation in this area.

Sincerely,

DREW LEWIS.

Senator STEVENS. Thank you very much, Admiral. We appreciate very much the support that you and Secretary Lewis and your General Counsel and Lee Verstandig of your Congressional Relations Office gave us in the last session.

I have only one question. The House passed a bill and sent it to us in the closing hours of the last Congress, and I understand there were some compromise provisions in that, but would that bill have been acceptable to you?

Admiral SHEAR. Yes, that bill would have been acceptable, and it was so indicated by correspondence from Secretary Lewis last fall.

Senator STEVENS. Fine. I thank you very much.

Senator Gorton.

Senator GORTON. Admiral, I thank you not only for your statement today but for your constant and devoted work toward this end during the course of the last Congress. I would like, however, to have you clarify your testimony in one respect. In your testimony, you set out your objectives to minimize Government intervention in business, to maintain a strong U.S. merchant marine and to put U.S. carriers on an equal footing with foreign carriers, all of which are worthy goals and objectives.

Is it not also your objective and your view of the bill that this would be good for shippers and for the consumers of the services as well?

Admiral SHEAR. Yes, it is certainly our position that it would be good for shippers as well as the rest of the industry.

Senator GORTON. Thank you very much.

Thank you, Mr. Chairman.

Senator STEVENS. Thank you.

Senator Trible.

Senator TRIBLE. I have no questions, sir. Thank you.

Senator STEVENS. Admiral, we may have to recall you when Senator Inouye comes to see if he has any questions, but for the time being, I appreciate your presence and your support. Can you wait just a few minutes? I understand Senator Inouye is coming and he might have some questions. I don't know whether he does or not. The staff indicates he may not, but we appreciate your assistance.

Admiral SHEAR. Thank you, sir.

Senator STEVENS. We would now call Mr. Green.

## STATEMENT OF HON. ALAN GREEN, JR., CHAIRMAN, FEDERAL MARITIME COMMISSION, ACCOMPANIED BY JONATHAN BENNER, GENERAL COUNSEL; AND ROBERT ELLSWORTH, DIRECTOR, OFFICE OF REGULATORY POLICY AND PLANNING

Mr. GREEN. Thank you very much, Mr. Chairman. My two captains here, sir, are the Commission's General Counsel, Jonathan Benner, and Dr. Robert Ellsworth, who is Director of our Office of Regulatory Policy and Planning.

You asked that, because of the time element, these statements be shortened. You have a complete written statement from the Federal Maritime Commission which has the full support of all of the Commissioners on the Federal Maritime Commission. In order to save you time, I would like to make one or two very key points.

Would that be satisfactory?

Senator STEVENS. Entirely satisfactory.

Mr. GREEN. All right, Mr. Chairman.

The one thing is clarification of existing antitrust immunities. I would like to repeat that again. Clarification. Clarification is the key word in this thing, clarification of existing antitrust immunities. In the last Congress, provisions of maritime regulatory reform bills which attempted to clarify existing antitrust immunities were the underserving source of misunderstandings and confusions. This was not the fault of the bills themselves but reflected a lack of knowledge about the existing law and a lack of familiarity with the international shipping industry.

There can be no doubt that the antitrust immunity provisions of current law have caused carriers to be uncertain as to which of their activities are truly covered by immunities and which are not. Moreover, the current system of dispensation of antitrust immunity has resulted in instances of conflict between the enforcement programs of the Antitrust Division of the Department of Justice and the regulatory programs of the Federal Maritime Commission.

S. 47, like its predecessor, S. 1593, attempts to define with precision those activities which are deemed to be antitrust exempt. The bill eliminates the ambiguous preapproval standards of section 15 existing in the current shipping act. It replaces existing approval procedures with a precise statement of prohibited acts designed to prevent actual discernible anticompetitive practices.

The Commission proposed such an approach during the deliberations of S. 1593. We also succeeded in gaining the support of the Department of Transportation for a precise definition of prohibited acts which applies to activities of combinations of ocean carriers. We continue to support this approach because we believe it represents a realistic and responsible balance between the need of ocean carriers in international commerce to collectively separate and agree on services and in the interest of consumers and shippers in avoiding the irresponsible exercise of collective powers.

We would hope that those who have opposed this kind of approach in the last Congress would avoid the sweeping and inaccurate characterizations regarding the scope of antitrust immunity

being granted. They should instead focus on the types of anticompetitive harm they feel should be avoided.

To the extent that the Congress believes anticompetitive injury will result from antitrust immunity, we encourage the Members of Congress to focus on developing precise prohibitions against particularly harmful activities identified by those who have misgivings about the general approach of this legislation.

We believe the prohibitions contained in S. 47 are well-drafted and well-designed to meet all realistic assessments of harm which might result from abusive collective activities by competing ocean carriers.

The other point I would like to make, Mr. Chairman, is the clarification of intermodal authority. It is essential that Congress act to restate clearly the authority contained in the current shipping act which permits conferences of ocean carriers to publish and set intermodal rates.

As we explained in our testimony on S. 1593, the Department of Justice has challenged the authority of the Federal Maritime Commission to approve section 15 agreements providing for the joint publication and setting of intermodal through rates. The matter has been litigated before the Court of Appeals, the District of Columbia Circuit, and has been dismissed as moot due to the withdrawal of the underlying agreement.

The issue will, no doubt, surface again. We believe that the authority of conferences to publish intermodal rates must be clarified in order to provide the entire shipping community with the widest possible access to the commercial advantages and economies of intermodal transportation. We continue to support legislation which clarifies conference intermodal authority.

The provisions of S. 47 which relate to this subject are sound. They are consistent with an understanding between the FMC and the Interstate Commerce Commission that authority of conferences to publish intermodal rates in no way authorizes collective ocean carrier negotiations of inland rate divisions with carriers regulated by the Interstate Commerce Commission.

The conditions which made the climate ripe for regulatory reform in 1981 and 1982 continue to exist today. However, there are many pressing problems in the maritime field which are not addressed by this particular piece of legislation. The maritime community is beset by fast-changing conditions since I last testified before this committee in support of maritime regulatory reform, and a great deal has taken place, most of which has been harmful to the maritime community.

The global downturn of economic conditions has caused a significant decrease in cargo volumes and many carriers face conditions of excess capacity which place at great risk their heavy capital investments in our foreign trades. The Federal Maritime Commission will devote its resources of experience and technical knowledge to assist the committee in moving this legislation toward speedy enactment. To that end, we will supply the committee with detailed technical comments should the committee deem that helpful.

I would be happy to answer any questions you may have at this time. Thank you very much, sir.

Senator STEVENS. Thank you very much. We are delighted to have you and the captains with us.

Incidentally, I have ordered your statement printed in full in the record, and we have Admiral Shear here if you wish to ask him any questions.

Senator INOUYE. Mr. Chairman, I thank you very much. I wish to apologize for my lateness, but it seems like half the city has turned out for the Redskins.

Also, Mr. Chairman, I would ask unanimous consent that the questions I have prepared to ask the admiral be made a part of the record.

Senator STEVENS. Yes, we will submit to those, Admiral, and that is without objection.

[The material referred to follows:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

*Question.* Do you believe our current regulatory policy operates unfairly for U.S.-vessels vis-a-vis their foreign-flag competitors?

Answer. Yes, for the very simple reason that it is possible for the Justice Department to police effectively U.S.-flag common carriers operating in our foreign commerce, but not the operations of our foreign-flag competitors. As you know, many of our trading partners have enacted so-called Blocking Statutes to preclude any such investigations by the Justice Department. As a result, U.S.-flag carriers find it difficult to protect themselves against a wide variety of anticompetitive activities that can be engaged in by our foreign-flag competitors.

*Queston.* Under our present regulatory scheme, no one seems to know with any certainty when the provisions of the Shipping Act apply and when the antitrust laws apply. Has this situation caused diplomatic friction?

Answer. Activities of ocean liner companies under approved agreements have been immunized from the antitrust laws since the Shipping Act of 1916 was enacted. This immunity has been eroded over time through court decisions and administrative actions, so that today this lack of clarity constitutes one of the most serious problems confronting U.S. and foreign-flag common carriers operating in our foreign commerce. Attempts at the extraterritorial application of our antitrust laws have been a constant source of friction with our trading partners. Some have retaliated by the enactement of the so-called Blocking Statutes. These national laws prohibit the release of information that would be required by the Justice Department in such antitrust investigation. There is a need to clarify this antitrust immunity and for Congress to reaffirm that strict reliance on the antitrust laws is incompatible with the operating practices that exist in international shipping today.

Senator INOUYE. Mr. Green, you have just testified that the Department of Justice has frequently intervened when U.S. carriers have sought section 15 approval for agreements. Has the Department of Justice ever intervened when parties seeking the section 15 approval were all foreign flag operators, such as the Japanese carriers when they sought approval for their joint service agreement?

Mr. GREEN. I would have to say to that, Senator, that in all probability that the Department of Justice has concentrated more on the American carriers than they have the foreign carriers. We would be very happy to research that for you, sir, and submit it.

But Mr. Benner, you are the General Counsel of the agency. Would you say that I was approximately correct in what I said, sir? He is the lawyer; I am the businessman.

Senator INOUYE. Has Justice ever intervened?

Mr. BENNER. Senator, I would not be comfortable in saying that the Justice Department has never intervened to oppose an agreement solely involving foreign carriers. We would have to check

that. I do think the Chairman's statement is quite accurate that the focus of Justice Department interventions has been on those instances which involved U.S. carriers, and we will provide you with a precise statement of the numbers.

[The information referred to follows:]

FEDERAL MARITIME COMMISSION,
*Washington, D.C., February 9, 1983.*

Hon. DANIEL K. INOUYE,
*Subcommittee on Merchant Marine, Committee on Commerce, Science, and Transportation, Dirksen Senate Office Building, Washington, D.C.*
(Attention of John Hardy)

DEAR SENATOR INOUYE: During my February 2, 1983 appearance before the Subcommittee on Merchant Marine concerning S. 47, the "Shipping Act of 1983", I was asked to submit the statistics relating to Department of Justice intervention in Section 15 proceedings when the parties seeking approval of an agreement, were all foreign-flag operators.

Department of Justice participation in section 15 cases over the last ten years is as follows:

1972—Docket No. 72-17 Agreement No. 10,000—North Atlantic Pool.
1973—Docket No. 73-21 In the Matter of Agreement No. DC-57.
1974—None.
1975—None.
1976—Docket No. 76-11 In Re: Agreements Nos. 150 DR-7 and 3103 DR-7. Docket No. 76-35 Cancellation of Consolidation Allowance Rule.
1977—Docket No. 77-6 In Re: Agreements Nos. 8210-29 and 9214-14; A/AA Modifications. Docket No. 77-10 Agreements Nos. 10072 and 10072-1. Docket No. 77-19 Agreement No. 10235 Consolidated Forwarders Intermodal Corp. Docket No. 77-23 Agreement No. 10294. Docket No. 77-33/34 Agreement No. 10044-3 and Agreement No. 10041-4. Docket No. 77-43 Agreement No. 10286 WINAC.
1978—None.
1979—None.
1980—None.
1981—Docket No. 81-15 United States—European Trade Carriers Cooperative Study Agreement No. 10318.
1982—Docket No. 82-7 Agreement No. 150-70 Transpacific Freight Conference of Japan/Korea Minority Rate Initiative.

A review of our records pertaining to these cases confirms that in the past ten years, the Department of Justice has not intervened in any proceeding involving a section 15 agreement that was solely among foreign carriers. However, the Department of Justice has intervened insection 15 cases in which a majority of the signatories of the agreement were foreign-flag carriers.

I hope that this is of assistance to you, if we can be of additional assistance, please let me know.

Sincerely,

ALAN GREEN, Jr. *Chairman.*

Senator INOUYE. Would it be correct to say that maybe the Department is on the other side?

Mr. BENNER. I would not say that. I think the focus has been on the areas that affect the U.S. economy most, but I think in the Justice Department's viewpoint—I don't want to speak for them—is that they concentrate on matters involving U.S. carriers.

Mr. GREEN. I don't want to criticize the Department of Justice; we are, Senator, trying to work as a team. I think we are working out out problems, but we will conduct the inquiry as you have asked.

Senator INOUYE. I would appreciate the results of your review, sir.

Mr. GREEN. You will certainly receive them, sir.

Senator INOUYE. You suggested that because of administrative and judicial interpretations the FMC has found the Shipping Act cumbersome and burdensome. Would you give this committee some

specific examples how the application of this act has been cumbersome for the FMC and how its application has been burdensome to the carriers?

Mr. GREEN. The Shipping Act, of course, was written in 1916. It has had 33 amendments. Basically it is not a bad act. One of the biggest problems has been the judicial interpretations of section 15 with the antitrust immunity. It simply needs modernization and clarification.

For more specific answers to your question, I would refer that to our General Counsel, Mr. Benner, and perhaps you could carry on from there, Jon.

Mr. BENNER. I think the best examples of the kind of prolonged proceedings that you referred to are perhaps the ones that have dealt with conference intermodal issues. I cite them because they are relatively recent and also because we have strongly advocated clarification of existing law in this area.

We have had one case which, as the chairman mentioned, has gone to the court of appeals on the issue of whether section 15 as it is now written includes the authority for conferences to publish intermodal rates. It took approximately 2 years for that case to proceed to a court of appeals level, where the answer was that the case was moot. We don't know any more from the court now than we did when we started.

We have another case in the pipeline with the court of appeals that involves the application of intermodal rates to conference dual-rate contracts. That that docket—which is number 7611, so it originally appeared with the Commission in 1976—will probably not be resolved for at least another year.

So this is an area that is probably a fairly good example of where lack of specificity in section 15 itself creates very time consuming, contentious proceedings.

Senator INOUYE. And from your standpoint, you believe that S. 47 will cure some of these problems and clarify the issues?

Mr. GREEN. Yes, sir, we do.

Senator INOUYE. Would it resolve the problem that you just discussed in section 15?

Mr. GREEN. Yes, sir, it would.

Senator INOUYE. You stated that the global downturn of economic conditions has caused a significant decrease in cargo volumes and many carriers face conditions of excess capacity which place at great risk their heavy capital investments in our foreign trades.

Does this present world situation pose a particular threat to the U.S.-liner trades, and U.S.-flag vessels as compared to foreign bottoms?

Mr. GREEN. I would say yes, it does, sir.

Dr. Ellsworth, do you want to comment?

Mr. ELLSWORTH. Because the United States is still the leading country in the world economy, clearly we are being affected adversely by this, the economic cycle, and as it affects it trades as severely if not more severely than others, clearly the U.S. lines who are heavily in our trades rather than being in foreign trades are being adversely affected as our international trading situation is adversely affected.

Senator INOUYE. Would the passage of this bill in any way alleviate the burden?

Mr. ELLSWORTH. It will not alleviate the conditions which are on the demand side, that is, the downturn in the economy, but it hopefully will alleviate some of the burdens on the supply side. That is, if the carriers can begin to cooperate and rationalize their services and temporarily, perhaps, lay up some excess tonnage, that should help to reduce the burden placed on these vessel operators.

Senator INOUYE. And finally, Mr. Green, do you feel that the scope of activities prohibited by section 12 of this bill is broad enough to safeguard shippers and the public as well as independent vessel operators?

Mr. GREEN. Yes, I do, sir.

Senator INOUYE. I thank you very much, sir.

Thank you, Mr. Chairman.

Senator STEVENS. Senator Gorton.

Senator GORTON. I have no questions.

Senator STEVENS. Senator Trible.

Senator TRIBLE. I have no questions, Senator.

Senator STEVENS. We thank you very much and appreciate your appearance.

Mr. GREEN. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF HON. ALAN GREEN, JR., CHAIRMAN, FEDERAL MARITIME COMMISSION

Good morning, Mr. Chairman, I am pleased to appear before you this morning in support of S. 47. I am accompanied today by Jonathan Benner, the Commission's General Counsel, and Robert Ellsworth, Director of our Office of Regulatory Policy and Planning.

As Chairman of the Federal Maritime Commission, I represent the agency most affected by any proposals for reform of our maritime regulatory programs. Moreover, the FMC is the agency most knowledgeable about the problems the liner industry continues to face and the weaknesses of the existing regulatory regime. As you well know, I appeared before this Subcommittee in September of 1981 strongly supporting S. 1593, the predecessor of the current bill. S. 1593 was a good bill. It was a bill that the Federal Maritime Commission strongly supported. It was a bill which attracted a high degree of involvement by all sectors of the maritime community. The FMC continues to strongly support these reforms and strongly supports S. 47 because this bill represents much of the consensus that was so diligently developed in the 97th Congress.

During the past eighteen months I have encouraged internal reforms at the Federal Maritime Commission which, to the extent permitted by existing law, reflect the objectives of regulatory legislation in the last Congress. We have made substantial gains in reducing agreement processing times and in minimizing unnecessary intrusions into the commercial realm. In the final analysis, though, my colleagues and I require new legislation if we are to change the basic approaches to regulation of foreign oceanborne commerce.

Because the positions of the Federal Maritime Commission on the basic issues addressed by S. 47 are well known to all who have followed the debates over maritime regulatory reform, I will not burden the members of this Subcommittee with detailed technical analysis. For the record, I would nonetheless like to identify those aspects of the bill which we believe to be most important in the revision and modernization of the existing regulatory scheme.

CLARIFICATION OF EXISTING ANTITRUST IMMUNITIES

In the last Congress, provisions of maritime regulatory reform bills which attempted to clarify existing antitrust immunities were the underserving source of misunderstandings and confusion. This was not the fault of the bills themselves, but reflected a lack of knowledge about the existing law and a lack of familiarity with the international shipping industry. There can be no doubt that the antitrust immu-

nity provisions of current law have caused carriers to be uncertain as to which of their activities are truly covered by immunities and which are not. Moreover, the current system of dispensation of antitrust immunity has resulted in instances of conflict between the enforcement programs of the Antitrust Division of the Department of Justice and the regulatory programs of the Federal Maritime Commission. S. 47, like its predecessor, S. 1593, attempts to define with precision those activities which are deemed to be antitrust-exempt. The bill eliminates the ambiguous approval standards of section 15 existing in the current Shipping Act. It replaces existing approval procedures with a precise statement of prohibited acts designed to prevent actual, discernible anti-competitive practices. The Commission proposed such an approach during the deliberations on S. 1593. We also succeeded in gaining the support of the Department of Transportation for a precise definition of prohibited acts which applies to activities of combinations of ocean carriers. We continue to support this approach because we believe it represents a realistic and responsible balance between the need of ocean carriers in international commerce to collectively set rates and agree on services, and the interest of shippers and consumers in avoiding the irresponsible exercise of collective powers. We would hope that those who have opposed this kind of approach in the last Congress would avoid the sweeping and inaccurate characterizations regarding the scope of antitrust immunity being granted. They should instead focus on the types of anti-competitive harm they feel should be avoided. To the extent that Congress believes anti-competitive injury will result from antitrust immunity, we encourage the members of Congress to focus on developing precise prohibitions against particular harmful activities identified by those who have misgivings about the general approach of this legislation. We believe that the prohibitions contained in S. 47 are well drafted and well designed to meet all realistic assessments of harm which might result from abusive collective activity by competing ocean carriers.

### CLARIFICATION OF INTERMODAL AUTHORITY

It is essential that Congress act to restate clearly the authority contained in the current Shipping Act which permits conferences of ocean carriers to publish and set intermodal rates. As we explained in our testimony on S. 1593, the Department of Justice has challenged the authority of the Federal Maritime Commission to approve section 15 agreements providing for the joint publication and setting of intermodal through rates. The matter has been litigated before the Court of Appeals for the District of Columbia Circuit and has been dismissed as moot due to the withdrawal of the underlying agreement. The issue will no doubt surface again. We believe that the authority of conferences to publish intermodal rates must be clarified in order to provide the entire shipping community with the widest possible access to the commerical advantages and economies of intermodal transportation. We continue to support legislation which clarifies conference intermodal authority. The provisions of S. 47 which relate to this subject are sound. They are consistent with an understanding between the FMC and the Interstate Commerce Commission that authority of conferences to publish intermodal rates in no way authorizes collective ocean carrier negotiation of inland rate divisions with carriers regulated by the Interstate Commerce Commission.

The conditions which made the climate ripe for regulatory reform in 1981 and 1982 continue to exist today. However, there are many pressing problems in the maritime field which are not addressed by this particular piece of legislation. The maritime community is beset by fast-changing conditions. Since I last testified before this Committee in support of maritime regulatory reform, a great deal has taken place, most of which has been harmful to the maritime community. The global downturn of economic conditions has caused a significant decrease in cargo volumes and many carriers face conditions of excess capacity which place at great risk their heavy capital investments in our foreign trades.

We must all be concerned with the international events that threaten to hamstring U.S. foreign commerce through the application of severe protectionist restrictions by some of our trading partners. We must also consider changing the regulatory regime which applies to the domestic offshore trades. With all this in mind, I expect this year to be a very busy one for Congress. However, none of these factors diminish the urgency of acting on this bill.

The Federal Maritime Commission will devote its resources of experience and technical knowledge to assist the Committee in moving this legislation toward speedy enactment. To that end we will supply the Committee with detailed technical comments should the Committee deem that helpful. I would be happy to answer any questions you may have at this time.

Senator STEVENS. We now have the panel of J. Patrick Boyle, transportation counsel of the United Fresh Fruit and Vegetable Association, and Ronald N. Cobert, general counsel, American Institute for Shippers' Association.

Proceed as you wish, gentlemen, one and then the other. We would like to hear both your statements and then we will allow questions.

## STATEMENTS OF J. PATRICK BOYLE, GOVERNMENT AFFAIRS COUNSEL, UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION; AND RONALD N. COBERT, GENERAL COUNSEL, AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.

Mr. BOYLE. Thank you very much, Mr. Chairman. I am Patrick Boyle, government affairs counsel to the United Fresh Fruit and Vegetable Association, headquartered in Alexandria, Va. United commends the chairman and Senator Gorton and the other cosponsors for reintroducing the Shipping Act of 1983 and providing the association with the opportunity to comment upon it.

United is a member of the Shipper Coordinating Committee on Maritime Reform that worked throughout the last session with the committee and the staff on this piece of legislation. And as a member, we fully endorse the comments of Du Pont's Clifford Sayre, who will be testifying later this morning.

Briefly, United is a national trade association representing the fresh fruit and vegetable industry. Its 2,500 member companies are engaged in all facets of the fresh produce industry and handle more than 80 percent of the fresh fruits and vegetables which are commercially marketed in and from the United States.

Secretary of Agriculture John Block has often asserted that the expansion of export markets for our Nation's agricultural products is one of the highest priorities of the Department. The fresh fruit and vegetable industry is an active participant in the expanding international trade of agricultural commodities; for example, in 1981 the United States exported more than 3 billion dollars' worth of fresh produce.

United believes that these export activities will have a positive impact upon the U.S. balance-of-trade situation. Because of the predominance of ocean transportation in the international trade of agricultural commodities and its significant effect on the price of the commodities in foreign markets, the fresh fruit and vegetable industry is in support of the subcommittee's efforts to reform the Federal maritime regulations.

Of particular importance to the members of United is section 4 of the bill, which allows shippers to establish shippers' councils for specified purposes, and section 8 of the bill, which exempts the shippers' councils from antitrust laws.

This right to organize into shippers' councils may be of little use or importance to many large cooperative shippers of grain, for example, or giant corporate shippers of various industrial goods. Those larger shippers are frequently in a position to negotiate equitably and effectively with conference carriers.

On the other hand, the fresh fruit and vegetable industry is comprised of thousands of small and medium-sized growers who fre-

quently lack the economic volume and the technical expertise which are necessary to negotiate a reasonable contract for the export movement of their perishable commodities. In many instances, it is not economically feasible for these small growers to engage in 1-on-1 efforts with individual carriers and single representations before conference committees.

Moreover, antitrust concerns prevent groups of growers from selecting or appointing a representative to discuss general shipping matters of importance to them with the conferences.

The provisions of this bill will eliminate that concern by clearly permitting the shippers' councils to consult and confer with any ocean common carrier or conference regarding a variety of transportation matters.

Of even greater significance to small and medium-sized shippers is the provision in the bill allowing shippers' councils to consolidate cargo and negotiate time-volume and service contracts with ocean common carriers.

In a letter to former Secretary of Transportation Drew Lewis, Secretary John Block expressed USDA support for a shippers' council provision, as did a recent report from the Government Accounting Office concerning Federal maritime regulation. During the previous session of Congress a few observers were critical of this maritime reform legislation because it seemed to favor the ocean carriers, their conferences and large export shippers.

United disagrees and submits that in addition to authorizing the shippers' councils there are a number of provisions which Cliff Sayre will address in his testimony which will accrue to the benefit of all ocean shippers regardless of their size.

In conclusion, United is supportive of S. 47 and appreciates this opportunity to appear before you today. We look forward to working with the subcommittee and its staff to develop legislation which will benefit both the shippers and carriers. The association is confident that such a bill is attainable and will enable the fresh fruit and vegetable industry to expand its export activities, thereby tendering more cargo to U.S. carriers and strengthening the Nation's merchant marine industry.

Senator STEVENS. Thank you very much, sir. Your complete statement will be printed in the record. We appreciate your summarizing.

[The statement follows:]

STATEMENT OF J. PATRICK BOYLE, GOVERNMENT AFFAIRS COUNSEL, UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION

Good morning. My name is Patrick Boyle, government affairs counsel to the United Fresh Fruit and Vegetable Association headquartered in Alexandria, Virginia. United commends Senator Gorton and his co-sponsors for reintroducing the "Shipping Act of 1983" (S. 47) and for scheduling this hearing so early in the new session of Congress. The association appreciates this opportunity to comment upon the bill and convey its support of it.

Briefly, United is a national trade association representing the fresh fruit and vegetable industry. Its 2,500 member companies are engaged in all facets of the fresh produce industry and handle more than eighty (80) percent of the fresh fruits and vegetables which are commercially marketed in and from the United States.

During fiscal year 1981 the United States exported approximately $200 billion worth of goods. Agricultural commodities accounted for more than $40 billion worth of total U.S. exports. The agricultural industry expects this figure to increase dra-

matically during the coming years. Indeed, Secretary of Agriculture John Block has often asserted that the expansion of export markets for our Nation's agricultural products is one of the highest priorities of the Department.

The fresh fruit and vegetable industry is an active participant in the expanding international trade of agricultural commodities. For example, in 1981 the U.S. exported more than $3 billion worth of fresh produce. As a result United believes that these export activities will have a positive impact upon the U.S. balance of trade situation.

The vast majority of these fresh fruit and vegetable export shipments utilize ocean carrier transportation. As a general rule the transportation costs of exporting U.S. goods account for approximately twenty (20) to forty (40) percent of the delivered price of the commodities sold abroad. Because of the predominance of ocean transportation in the international trade of agricultural commodities and its significant effect on the price of the commodities in foreign markets, the fresh fruit and vegetable industry is very much interested in the reform of the federal regulations governing the U.S. merchant marine industry and supportive of the legislation before this subcommittee.

Of particular importance to the members of United is Section 4 of the bill which allows shippers to establish shippers' councils for specified purposes and Section 8 of the bill which exempts these shippers' councils from antitrust laws. Many of our member-growers of export-bound fresh fruits and vegetables are small- or medium-sized firms. Under current maritime law, an individual grower desiring to ship its fresh produce abroad must deal directly with the ocean carriers and their conferences. According to the Florida Fruit and Vegetable Association, a regional association which belongs to United, "negotiations with steamship lines are limited to one-on-one efforts with individual carriers and single representations before conference committees." In many instances, it is not even economically feasible for these growers to engage in one-to-one negotiations with ocean common carriers and their conferences, and those that do often have very little leverage with which to negotiate reasonable transportation contracts.

In an attempt to deal more efficiently and successfully with conference carriers, a group of growers selected a representative to discuss general matters of importance with the conferences. Specifically, apple, pear and cherry growers in Oregon and Washington directed the Northwest Horticultural Council, another regional association with membership in United, to meet with key conferences on their behalf. Because of the ambiguities in current maritime law and possible antitrust ramifications of such meetings, the discussions were always restricted and usually unproductive. As a matter of fact, one East Coast conference flatly refused to talk with the growers' representative.

The provisions of this bill will eliminate that concern by clearly permitting these shippers' councils to "consult and confer with any ocean common carrier or conferences regarding general rate levels, charges, classifications, rules, practices, or services." Of even greater significance to small- and medium-sized shippers will be the ability of their shippers' councils to "consolidate cargo and negotiate time-volume and service contracts with ocean common carriers," which is permitted in this bill.

Large cooperative shippers of grain or giant corporate shippers of industrial goods are in a position to negotiate equitably and effectively with conference carriers. Consequently, the right to organize into shippers' councils may be of little use or importance to many of them. On the other hand, the shippers of fresh fruits and vegetables are frequently smaller growers lacking the economic volume and technical expertise which are necessary to negotiate a reasonable contract for the export movement of their perishable commodities.

In a letter to former Secretary of Transportation Drew Lewis, Secretary Block expressed USDA's support for a shipers' council provision in this maritime reform bill to ensure "that we have a healthy and viable shipping industry and that our agricultural exporters can do business with the ship owners in an effective manner." Likewise, a recent report from the Government Accounting Office concerning federal maritime regulation concluded that "we believe that if the powers of conferences are significantly enhanced by extensive antitrust immunity, then U.S. shippers should be provided the opportunity to form councils to safeguard their interests."

This bill will ensure that the fresh fruit and vegetable industry, as well as small- and medium-sized exporters of other agricultural commodities and industrial products, can remain vibrant participants in the international trade of U.S. goods.

During the previous session of Congress a few observers were critical of this bill because it seemed to favor the ocean carriers, their conferences and large export shippers. United disagrees and submits that, in addition to authorizing shippers' councils, there are a number of provisions contained in the bill which will accrue to

the benefit of all ocean shippers, regardless of their size. For example, Section 5(d) establishes a right of independent action for any member of a conference regarding rates and services if the conference has in effect a loyalty contract with one or more shippers. This will permit an individual carrier to respond to the unique transportation needs of a specific shipper, while remaining in the conference system structure.

Section 3(14) states that a loyalty contract between a shipper and a carrier or its conference may encompass all of a shipper's cargo or a fixed portion of it, thereby increasing the flexibility of the agreement to meet the transportation needs of both parties.

Section 9 permits the inclusion of time-volume rates in the tariffs of conference carriers and allows the parties to negotiate service contracts. Both the time-volume rates and the service contracts will make international ocean transportation more efficient and cost-effective for U.S. shippers.

In conclusion, United supports the "Shipping Act of 1983" (S. 47) and appreciates the opportunity to comment upon it. The association is confident that the provisions of S. 47 will enable the fresh fruit and vegetable industry to expand its export activities, thereby tendering more cargo to U.S. carriers and strengthening the nation's merchant marine industry.

Senator STEVENS. Mr. Cobert.

Mr. COBERT. Mr. Chairman, Senators, my name is Ronald N. Cobert. I am general counsel to the American Institute for Shippers' Associations.

This is the first time that the cooperative shippers association industry has taken a position with respect to the maritime industry. The association industry grosses approximately $750 million; approximately 70 to 75 percent of those dollars are going into the coffers of the surface common carrier industry.

Shippers' associations today operate almost exclusively in the domestic market. Since approximately 1960 there have been Government attempts to encourage shippers associations to move into the international shipping market. The movement however, has not proved to be successful, primarily because of the regulatory scheme which has existed over the years.

Shippers associations have been very successful domestically, and would like the opportunity to move into the international shipping market. We believe that S. 47 will give us that opportunity in two respects. First, we believe that the definition of "shipper," as contained in section 3, includes cooperative nonprofit shippers' associations. Such status as a "shipper" will enable associations to have a more clearly defined status in the international market.

Second, we see an opportunity under this legislation to qualify shippers' associations as shipper councils. Such recognition will provide associations with sufficient encouragement and advantages which will enable the association industry to move into the international shipping market. We believe that the same concept that we have had in domestic shipping can now be carried over into an international shipping market as a result of the passage of this bill. And accordingly, we support S. 47. Thank you.

[The statement follows:]

STATEMENT OF RONALD N. COBERT, GENERAL COUNSEL, AMERICAN INSTITUTE FOR SHIPPER'S ASSOCIATIONS, INC.

My Name is Ronald N. Cobert. I am the General Counsel of the American Institute For Shippers' Associations, Inc. I am here today to testify in support of S. 47, the "Shipping Act of 1983".

Shippers' associations are non-profit cooperatives consisting of shipper members. The members of such associations can secure the advantages of bulk rate transportation by combining the small lots of many shippers into large shipments. In this

manner shipper members can obtain lower per unit rates for their shipments than would otherwise be possible if they had to ship in small lots. Shippers' associations are run by the shipper members themselves and members are free to use the cooperative's services or not as they may desire.

Cooperative shippers's associations have existed since before the turn of the century. Their specific legal recognition for domestic surface transportation is found in the Interstate Commerce Act (49 U.S.C. § 10562). They are not common carriers so, unlike freight forwarders and other types of common carriers they are not subject to the jurisdiction of the Interstate Commerce Commission. Consequently, they do not have to accept freight from the general public and do not have to publish and file tariffs.

Cooperative shippers' associations have been a great aid to small American companies. Such cooperatives enable these shippers to realize considerable savings on the transportation of freight and therefore provide a means by which these companies can hold down costs and more effectively compete with larger entities.

In the domestic transportation market it has been concluded that shippers' associations members receive savings of between five percent and fifty percent over the rates charged by freight forwarders and motor carriers. (An Examination Of Unregulated Shippers Associations, U.S. Department of Transportation, Office of Transportation Regulations, Washington, D.C., March, 1980 p. ii). This same study compared motor and freight forwarder rates with those of shippers' associations in movements in twenty-five city pairs and concluded that the association rates were lower on ninety-seven percent of the rates; lower by forty to forty-nine percent. (Id. p. iv). In large part due to the transportation cost savings that shippers' associations are able to provide to their members the estimated tonnage handled by them has grown from 2.4 million in 1964 to 9.0 million in 1978. (Id. p. 6).

The great value of shippers' associations to the small shipper is reflected in the fact that the average shipment size of freight moved by a shippers' association is smaller than the average shipment size of a freight forwarder. (Id. pp. 6–7). This means that those shippers with only small size loads tend to find a real advantage in using shippers associations.

It appears that S. 47 would aid small shippers by enabling them to expand the cooperative shipping concept that has been of such great value to them in domestic surface transportation to maritime transportation. In domestic transportation shippers' associations have always been treated as shippers but, in maritime transportation the Federal Maritime Commission ("FMC") has compelled them to operate as non-vessel-operating common carriers ("NVOCC") if they are to operate at all. Such a classification forces shippers' associations to establish tariffs and file them with the FMC and to provide their services to the general public. Consequently, because of this FMC policy, small shippers are denied the right to cooperatively transport their goods in international surface movements as they can in domestic surface movements.

In Section 3 of S. 47, definition "(23)" defines "shipper" to include not only the owner of the cargo but also the "person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made". Because shippers' associations would be the "person for whose account the ocean transportation of cargo is provided" we take this definition to include shippers' associations as "shippers" as they are in domestic surface transportation. Accordingly, under S. 47 shippers' associations could be in a position to provide significant transportation cost savings to small shippers in maritime transportation because they would be looked upon as "shippers". Thus, the rate advantages historically provided by shippers' associations in domestic surface transportation to small shippers could be extended to international surface transportation.

Under this definition of "shipper" shippers' associations could, among other things, enter into service contracts as provided for in Section 9(c) of S. 47 with either an ocean common carrier or a conference. Such contracts could provide for specified services under specified rates and conditions. Shippers' associations as shippers could also enter into loyalty contracts as provided for in Section 7 of S. 47.

The definition of "non-vessel-operating common carrier" provided in S. 47 (definition "(17)") defines NVOCCs in part as "a common carrier". Because shippers' associations are not common carriers they would not meet the definition provided of an NVOCC.

Section 3 of S. 47 also includes definition "(24)" defining a "shipper's council". This is determined to mean "an association of shippers or their agents, other than ocean freight forwarders and non-vessel-operating common carriers". This definition, when coupled with definition "(23)", is taken to include the right of shippers' associations to be members of shipper's councils. Therefore, under S. 47 shippers'

associations would have the full rights of all other shippers in maritime trade and would be in a position to provide the cost savings to small shippers in international movements as they now can in domestic movements.

In addition, it appears that under S. 47 members of shippers' associations could also form shippers' councils if they so desired. In this manner small shippers could also benefit from S. 47 because they could utilize advantages presented to them under the shippers' council concept.

In summary, we believe that S. 47 will enable small shippers through shippers' associations to obtain lower rates for their maritime transportation needs than is now possible. This bill with its treatment of shippers' associations as shippers will remove the regulatory shackles placed on such associations by the FMC and permit them to act as they do in domestic surface operations with the attendant savings thereby accomplished available to small shipper members of these cooperatives. Accordingly, the American Institute For Shippers' Associations, Inc. supports the enactment of S. 47.

Senator STEVENS. Thank you very much.

What is the size of the members of your organization? Are they small, medium, large shippers? What are they?

Mr. COBERT. We have 45 shippers' cooperative associations that are members of the American Institute for Shippers' Associations. The entire field is composed of approximately 100 to 130 shippers associations operating throughout the United States.

The 45 members that we have in our organization have an underlying membership of over 10,000 shippers throughout the United States. These 10,000 shippers are generally small shippers and ship generally small shipments. It is to the great advantage of the small shipper that they be able to combine their shipments in order to create the volume loads and obtain volume transportation rates.

According to studies that have been made under grants by the Department of Transportation, savings to the small shipper through shippers' associations are between 20 and 50 percent, with the mean being somewhere around 40 percent in the domestic market. We think we can achieve those same economies for the small shipper in the international market as well.

However, we have been prevented by the regulatory scheme in moving into that international market in the past.

Senator STEVENS. Well, your testimony is quite significant.

What is the size of your membership? Who are they, Mr. Boyle?

Mr. BOYLE. We represent 2,500 member companies, including the growers, the shippers, the receivers, both wholesalers and retailers. In short, we represent anyone who is involved in the growing, buying, and selling of fresh produce in the country. This bill will primarily benefit the shipping members of the association.

Senator STEVENS. Gentlemen, we are indebted to you for coming forward. You have a very interesting new perspective on this legislation.

Senator Inouye.

Senator INOUYE. One of the major arguments against passage of this measure is that the consumers of the United States would be ultimately hurt. Do you agree with that?

Mr. BOYLE. No, I do not agree with that at all. If you are talking about the people consuming the services of the carriers, such as the shippers we represent, we see a number of benefits which we have mentioned in our testimony. If you are talking about consumers who are actually buying goods here in this country, this bill is

going to address the export movement of goods, and it should not have an effect on domestic consumers.

Mr. COBERT. Also, from my standpoint, and from the standpoint of the shippers associations, we think that the consumers will be greatly benefited. The savings that we will be able to generate through the movement in international shipping we believe will be passed on to the consumer the same way that they have been passed on to the consumer in domestic transportation.

Senator INOUYE. All around you believe that everyone will benefit?

Mr. COBERT. We believe the shippers associations and their members will benefit.

Mr. BOYLE. We believe our members will benefit also.

Senator INOUYE. Thank you.

Senator STEVENS. Senator Gorton.

Senator GORTON. Mr. Boyle, a significant portion of your testimony relates to the authority to form shippers' councils, which as you know is back in this bill in a somewhat more substantial fashion than it was in the compromise. How important are those shippers councils to you and to your members? And how would you anticipate that your members would utilize that provision in the bill?

Mr. BOYLE. The provision itself, Senator, is extremely important to our people. As a matter of fact, as we look at the various shipper-oriented provisions in the bill from our particular perspective, that is the most important, although a number of other shippers have different priorities. We agree with their concerns and are supportive of them, but the shippers' council is for us the most important section in the legislation.

Not only is the provision back in this bill, it is in this bill in a form that will be of greater benefit to shippers' councils than it has appeared in any former legislation on the Senate side or the House side. To the extent that the provision may be diluted in the legislative process that lies ahead of us, the benefits accruing to small- and medium-size shippers will be decreased accordingly.

As far as how we see it will affect our industry or how our industry will utilize this, perhaps I can take as an example the apple growers in your own State of Washington and in Oregon. Virtually every orchardist in that State grows for the export market either directly or through packing houses that they utilize. In 1982 the total Northwest apple exports exceeded $110 million. In the next 5 years that industry expects a 40-percent crop yield of apples.

The major market for those apple exporters, Senator, is Taiwan. Last year they shipped over 3 million cartons of Washington and Oregon apples to Taiwan. The freight charge on those cartons ranges from $3 to $5, which collectively equals about $9 million or $15 million in annual freight charges to those growers.

That money is the difference between remaining competitive in foreign markets or being precluded from them entirely. Those growers feel that through a shippers' council they can consolidate this cargo, achieve greater efficiency and productivity in the export movements of their goods.

They can negotiate service contracts which will give them greater shipping flexibility and better service from the carriers. And with a 40-percent crop yield in the short term they feel there is

plenty of cargo for the carriers to handle abroad and plenty of export business for the apple growers in Washington.

Senator GORTON. Thank you very much. As a matter of fact, you anticipated my next question, which was parochial and directed at some of my own shippers. I would like you, however, to go on to the comments of your copanelist, Mr. Cobert. Do your members at the present time in shipping within the United States use the kind of shippers associations to which his testimony refers? And do you join in his testimony about the effect of this bill on them in foreign trade?

Mr. BOYLE. I am not the expert in shippers associations that Mr. Cobert is. I do not believe that our people use the associations extensively domestically, although he could probably shed more light on that particular aspect. I do feel that his testimony suggests another benefit resulting from this bill for small shippers.

Senator GORTON. Mr. Cobert, I will go on to you then and ask you the reverse of that last question, given your interest in shippers associations, and what you conceive to be the impact of this bill on them. Would your members also use the shippers councils provisions of this bill? Do you regard that as an important part of the bill?

Mr. COBERT. Absolutely, we do believe it is important. It will take away some of the potential problems which we see in dealing internationally. In response to your last question, since 1979 there has been more and more activity of the growers becoming members of the types of shippers cooperative associations to which I referred in my comments. The reason why 1979 becomes such a critical date is because that is the year that the ICC first started deregulating the transportation of fresh fruits and vegetables by railroads. As a result associations were able to consolidate through rail transportation fresh fruits and vegetables and coordinate those movements with the dry freight that otherwise has moved since the turn of the century.

Senator GORTON. I thank you.

Thank you, Mr. Chairman.

Senator STEVENS. Thank you.

Senator Trible.

Senator TRIBLE. No questions, Mr. Chairman.

Senator STEVENS. Gentlemen, we thank you very much and appreciate your coming to the committee today.

Our next panel will be: Dr. Allen Ferguson, Chairman of the National Institute of Economics and Law; and Prof. George E. Garvey, associate professor of law, Columbus School of Law, Catholic University.

The program says Dr. Ferguson first. We will go that way.

## STATEMENTS OF ALLEN FERGUSON, CHAIRMAN, NATIONAL INSTITUTE OF ECONOMICS AND LAW; AND GEORGE E. GARVEY, ASSOCIATE PROFESSOR OF LAW, COLUMBUS SCHOOL OF LAW, CATHOLIC UNIVERSITY OF AMERICA

Mr. FERGUSON. Thank you very much, Mr. Chairman and members of the subcommittee. I consider it a real opportunity——

Senator STEVENS. Could you pull the mike a little closer, Doctor? It slides right up to you.

Mr. FERGUSON. Is that better?

Senator STEVENS. I think so. The people in the back of the room could not hear you.

Mr. FERGUSON. Yes. I can hear myself better now. That is important.

I want to thank you for this opportunity to appear before your subcommittee right at the beginning of the new Congress on an issue that I have been interested in literally for 20-odd years. I think that one should consider that the Senate has provided the Congress with an opportunity to review once again, despite the 68 days of hearings, the pros and cons of this general kind of legislation, and to build effectively on that history.

I was very active, as some of you may be aware, in looking at the predecessor bills in the last Congress and, in fact, in arguing against them. In that process I undertook to become acquainted with a number of the people who were concerned and found with the end of the year in the late fall that there was a significant, it seemed to me, significant shift in orientation and a fragmentation of what had seemed to be a fairly solid phalanx of interested parties in support of the measures.

I think there was a growing awareness of all or more of the implications of the legislation. A number of large corporations or the representatives of large corporations with whom I spoke expressed a view that in the new Congress they would be interested in opposing such legislation.

I am told that the Chemical Manufacturers Association has or is considering notifying NITLE that it is going to take a new look at this kind of legislation. These are things I think that open up an opportunity for a new kind of consideration of some of these concerns.

There are some important things to be done. I think that one of the great threats to the U.S. international economy—that is, the international aspects of the U.S. economy, which is now very important, about 20 percent of our GNP—is the growing need of bilateralism which will work to constrain the effectiveness of especially our exporters.

I think that one should also consider that there is no impending disaster in the American merchant marine, defined either just as U.S.-flag carriers or the total U.S. merchant marine. There is obviously a recession, and that is hurting everybody. And this industry is no exception. But in 1980 the U.S.-flag carriers hauled a larger fraction and a larger absolute amount of liner traffic than they had done a decade earlier.

I think it makes sense to consider the study commission that was in the final version of the House bill. There are a number of specific things that I think it makes sense to consider. The obstacles to forming consortia should be reexamined if they can be formed in ways that do not impair competition. The notion of the essential trade routes is I think obsolete and unproductive.

The administration's position that U.S.-flag ship operators should be able to buy foreign is clearly a step in the direction of economizing. And there are ways of providing the necessary—and I am one

who believes that it is necessary—merchant marine or merchant fleet support for the military. There are more efficient ways than the thrust of this legislation.

S. 47 I see as one of the number of bills designed to attack or at least to curtail the effectiveness of the antitrust laws and to reduce the protection that the American consumers and producers have enjoyed traditionally under those laws. It is, in my judgment, contrary to the public interest. It is contrary to the public interest because it, in my judgment, does in fact strengthen cartels which are dominated by foreign corporations, some of those foreign corporations being explicitly instruments of their national governments.

I would disagree that it is simply a matter of clarifying the antitrust exemption in existing legislation. It is different in several key respects. The public interest standard is removed. The damages and penalties available for constraining the actions of the cartels are weakened; for example, there is no further—triple damages are no longer available to an injured party.

I might interject that I received a copy of S. 47 only Friday, and I certainly would not pretend that I understand all the details. These comments are based largely on a quick reading of that plus my acquaintance with the previous bills.

Perhaps most important is the shifting of the burden of proof. The burden of proof is now on the complainant, not on the cartel, not on the organization whose function and explicit purpose is to create an anticompetitive position in the individual trades.

Finally, the bill does permit a long list of specific practices which in economic terms are not competitive.

The consequences of all of this, and one of the intended consequences of all of this, is what is called rationalization, which means—and the benefit that is attributed to rationalization is reducing what is called excess capacity—rationalization means operationally reducing schedules, reducing frequencies, reducing port calls, reducing the number of ports served, so as to use any given volume of shipping capacity more fully.

Under competitive conditions, such rationalization would be likely to be economically efficient. Under cartelization, such rationalization can be expected at least to include some large inefficiencies. And certainly by the nature of rationalization it will tend to reduce jobs, jobs afloat and jobs on the dock.

It will also reduce the size of the American-flag logistics reserve currently. In commercial operation, the bill does permit a number of monopolistic pricing practices. And when I say monopolistic, one can equally substitute the word oligopolistic if you would like to be technically more rigorous. These will, in my judgment, impose several billions of dollars a year of cost on the American trade with the consequent adverse impact on American exports. It will place American exporters in a position of inferiority relative to their foreign competitors.

The case of the apples to Taiwan, I do not know in detail, but rates in the Pacific, as in the North Atlantic trades, have often been open in the last 10 years. That means competitive. This legislation will make it possible to button up those rates to make them tighter and to impose monopolistic rates on the apple exporters and other exporters in the American trades.

It will similarly permit tightening up the rates on imports to the disadvantage of American consumers. I heard someone say that he thought it would not be disadvantageous to American consumers. And by consumers, I am talking about households, the people at the final end of the economic chain.

There are four kinds of discounts that are explicitly allowed in these bills. Each of them I think is demonstrable. To be more modest, I might say arguable. Each of them is likely to benefit the very large and certainly the relatively powerful shippers and therefore set all but the largest shippers, both exporters and importers, at a competitive disadvantage vis-a-vis the largest participants in the trades.

That set of discounts is likely to work not only to the disadvantage of all but the largest shippers but to the disadvantage of independent carriers who are essential to some kinds of trade and probably to the disadvantage of many ports, both American ports versus Canadian ports, and the relatively small American ports versus the large American ports.

Finally—well, there are two finallys. Next to finally, the profits that will be gained out of this legislation will in fact tend to accrue predominantly, $3 out of every $4, to foreign corporations, foreign carriers.

And there are a number of matters of principle that are raised in these bills. Basically, it is rationalized, in part, by its proponents essentially as a bailout. It is a form of off-budget financing. It constitutes a means of imposing on consumers and shippers, both exporters and importers, rather than on taxpayers the cost of sustaining the American merchant marine.

It is inconsistent with the logic that underlies the whole thrust for deregulation because the basic premise of that thrust is that in the absence of government regulation, competition will protect the economy. And this bill moves away from competition.

That is, Mr. Chairman and members, a summary of my statement. Thank you very much.

[The statement follows:]

STATEMENT OF ALLEN R. FERGUSON, CHAIRMAN, NATIONAL INSTITUTE OF ECONOMICS AND LAW

S. 47 is one of many current attacks on the traditional antitrust laws. In addition, it sets particularly threatening precedents and can be expected to impose costs of some billions of dollars per year on American consumers, farmers, workers and exporters.

This statement discusses, in turn, the predictable consequences of the legislation, its justification and some policy initiatives that might effectively address some of the current problems of the U.S. merchant marine.

CONSEQUENCES OF THE PROPOSED LEGISLATION

The bill would permit ocean liner companies and their cartels to set monopolistic rates and services and to take many measures to protect their monopolistic position by excluding outsiders. Further, it removes any significant governmental regulatory constraint over such practices, and it reduces such regulation primarily to the prevention of competitive actions that might undercut the power of the cartels. It replaces governmental regulation with a delegation of regulatory powers to foreign-dominated private entities.

These measures will primarily benefit foreign carriers. According to the Maritime Administration, 72 percent of American import and export liner trades were carried in foreign ships in 1981. The conferences serving the United States are dominated

by foreign carriers. It is true that American liner companies will also tend to benefit. Cartels have historically set rates that cover the costs of their most inefficient members, and in most trades American operators are the high-cost carriers. Thus, they will be relieved of pressures to compete and to reduce their costs in order to survive. Although one of the motives for the bills is to subsidize the American merchant marine, it will (on the average) take $4.00 of increased profits to provide a $1.00 net gain to American carriers.

The burdens imposed by the legislation will, of course, fall largely on consumers; prices of imported goods will tend to rise. As monopolistic liner rates raise the delivered prices of American exports, U.S. farmers, workers and manufacturers will be placed at further disadvantage versus their foreign competitors.

The issue is important in dollars as well as in theory. According to the Maritime Administration, liner exports and imports in 1981 amounted to $148 billion or 5 percent of the gross national product. The annual cost of transporting this traffic is approximately $15 billion. Consequently, if the conferences are able to increase rates by as little as 20 percent, on the average, the shipping costs of American liner imports and exports would rise by some $3 billion per year—year after year. Further, although much of our agricultural exports move in bulk carriers, which would not be affected by the legislation, substantial volumes of cereals, fruits and vegetables, and feeds, as well as fertilizer, pulp and waste paper move in liners.

It may be argued that permitting the shippers—that is exporters and importers—to cartelize through shippers' councils would offset some of the disadvantage to consumers. There are four problems with this argument:

There is little empirical evidence to support it, despite the extensive experience in European and other trades not involving the United States.

Even in theory, shippers' councils, which permit shippers to bargain collectively with conferences, would produce what economists call bilateral monopoly; the two parties would seek to share monopoly profits, not to reduce them. Consequently, consumers' interest would be protected only incidently, if at all.

The councils would tend to be dominated by large shippers with regular commitments to particular trades; medium-sized, small and occasional shippers could be expected to have little influence on council policy.

Any "need" for shippers' councils derives entirely from the monopolistic position of the conferences; if that is eliminated, the case for shippers' councils disappears.

Among shippers, the greatest disadvantage could be expected to fall on small and medium-sized shippers. Despite the prohibitions [Section 12(b)(6)] against de juro discrimination, they would likely be discriminated against de facto in matters of rates and service. The conferences and their members would have far greater motive for providing service contracts, loyalty contracts, and volume and other discounts allowed under the bill to shippers of large amounts of traffic. Such discounts, if the result of open competition, would not discriminate against other shippers—they would reflect only the economies of handling large, frequent movements. However, when such rates are part of an oligopolistic price-setting institution, there is every reason to expect that they will impose uneconomic burdens on those shippers with the poorest alternatives, typically the smaller shippers. This appears to explain, in large part, the support of the legislation from some large shippers.

Independent liner companies and other operators who are not members of the cartels are also likely to be placed at a disadvantage. The potential for pressures on independent liner companies is more subtle:

The legislation of service contracts, which would presumably provide especially low rates and special services to large shippers, would not only to the disadvantage of small- and medium-sized shippers, but would also make it difficult for independent liner operators to enter, or to retain adequate schedules in, particular trades.

The provision of loyalty contracts would have similar effects. Only shippers whose traffic in a particular trade could be handled entirely (or nearly so) by an independent could afford to use the independent, even at rates well below the tariff or loyalty contract rates. The reason for this is that any traffic not handled by the independent carrier would have to move on a conference carrier at the tariff rate; at the same time, that shipper's competitors would have available to them the discounts inherent in the loyalty contract. As a consequence, independent liner companies could be expected to face discriminatory price competition which would threaten their ability to sustain revenues, schedules and service quality adequate to continue effective operation in many trades.

The right of independent action, Sec. 5(d) appears to permit some "competitive" rate setting. However, that is deceptive. An individual member of a conference does not have any general right of independent action, such as that provided in the Staggers Act to railroads in rate bureaus. Conferences are required to permit independ-

ent action only if they already have loyalty contracts in effect and if the proponent of the independent rate goes through a number of steps, subjecting its proposal to scrutiny and comment by all other members of the cartel. After such review, it can put an unpopular rate into effect, if it still wants to do so. However, conferences frequently operate on a principle of unanimity; therefore, the gains from any prospective unpopular independent action must be weighed against the costs of alienating other members of the conference, any one of which could veto some other future proposal.

This suggests that truly independent action is most unlikely. What seems much more likely is action to reduce the loyalty contract rates as a means of excluding a potential independent liner company or other rival from the trade. Thus, although "fighting ships" would be illegal, it appears that "fighting rates" would be allowed.

It can be argued, correctly, that the provision for the various discount rates has a pro-competitive element in theory. They provide means by which shippers with sufficient leverage can obtain legal rates less than the pure monopoly rates. Doing so could lead to the weakening or destruction of the cartel. However, that is not their likely effect in practice:

Under conditions of competition, wherever discounts rates reflected economic savings, they would be put into effect; therefore, the "need" for making special provision for their legality derives from the basic anti-competitive nature of the conferences.

The discounts provide a means of strengthening the cartels by focusing any "competition" on outsiders who threaten their power.

The effects of the legislation on jobs and American ports are also likely to be adverse. Much of the justification for providing legislative support to the conferences is put in terms of the "need" to "rationalize" ocean liner operations. "Rationalize" means reducing frequency of service, number of port calls and number of ports. All this is designed to reduce "excess capacity." Translated into its economic impacts, this means fewer jobs afloat and on the docks, less service through American ports. In fact, it is to be ordered that traffic will tend to be diverted to Canadian ports, especially for service to and from the northern, midwest and possibly the northwest ports.

Similarly, the defense impacts will also tend to be adverse. Reducing capacity (whether excess or not) will mean that less tonnage would be available for logistics support in the event of a national emergency.

In addition to these specific disadvantages of the proposed legislation, there are several respects in which it violates what can be considered matters of principle:

The legislation is a bail-out. It comes at a time when the public seems ready—as indicated by recent Congressional action on budgets for maritime subsidies—to reject the explicit subsidization of the maritime industry.

It is a peculiar form of off-budget financing. It provides subsidies through imposing costs on the public as consumers, workers and exporters, rather than as taxpayers.

Although it curtails the regulatory powers of the Federal Maritime Commission, it is inconsistent with the economic logic underlying the current move toward deregulation. That logic requires competitive markets to replace governmental involvement; the proposed legislation reduces competition.

It is anti-free market in its extreme support for international cartels.

The precedent established is perhaps more serious than the direct consequences. It is providing for antitrust exemption and no effective regulation is unique on the federal level. Further, granting antitrust immunity to an industry dominated by foreign corporations and one that has a history of anti-competitive practice will make it more difficult for the government to deny privileges of cartelization to any American industry.

The facts that one motive is to avoid disagreement with foreign governments and that some of them have apparently actively lobbied for the bill through the Department of State raise questions of the propriety of the legislation as an instrument of American policy.

### PURPOSE AND RATIONALE

In the words of the House committee report (H.R. 4374 of the 97th Congress), the purpose of the legislation is to "exempt from antitrust laws those agreements subject to regulation by the Federal Maritime Commission (FMC)," p. 14, while "the FMC is provided exclusive jurisdiction * * *," p. 15. The exemption from the antitrust laws is intended "* * * to be as broad an exemption as possible," p. 37.

The same general rationale for providing such exemption presumably underlies S. 47 as well. That rationale is that cartels in the American foreign trades are weakened by the present limited application of the antitrust laws through the FMC and the courts (Senate Report on S. 1593, 97th Congress, pp. 7-9). The contention appears to be true; for example, rates in the American North Atlantic trades have frequently been "open," that is competitive, through much of the past decade. It is my own judgement that the existence of these competitive rates accounts for much of the support of the legislation by U.S. and foreign carriers.

It is further intended to reduce and expedite regulation by the Federal Maritime Commission, leaving the cartels free to reach agreements that best serve their own interests. For example, preapproval of conference agreements is to be discontinued.

The stated intent of these measures is to support the U.S.-flag liner operators. The alleged need for such support derives from several sources:

(*a*) The U.S. liner industry is said to have declined to the point where it needs special legislation to sustain it.

(*b*) The antitrust laws, as applied, allegedly discriminate against American flag carriers.

(*c*) The American fleet is inefficient and consequently cannot "compete" effectively with its foreign rivals without some kind of financial assistance. As direct federal subsidies are reduced, the industry should be subsidized through monopolistic pricing.

(*d*) Increasing the monopolistic power of the cartels will permit "rationalization" of liner service, with reduced costs.

(*e*) A national-flag liner fleet is required for defense.

(*f*) Enforcement of antitrust laws against foreign liner companies has led to diplomatic problems.

(*g*) The regulators and the courts, since original passage of the shipping Act of 1916, have misconstrued the intent of Congress.

Each of these specific justifications for the legislation requires a brief comment before moving to a more extensive discussion of the nature of the legislation itself.

A. The General Accounting Office (GAO) report, requested by the House Committee on Merchant Marine and Fisheries (Changes in Federal Maritime Regulation Can Increase Efficiency and Reduce Costs in the Ocean Liner Shipping Industry) addresses extensively, especially in its appendices, the issue of the "decline" in the U.S. fleet. The report concludes that the decline in the number of American liner companies and in the number of liner vessels registered under the American flag is not the consequence of antitrust or FMC regulation, to which the proposed legislation is addressed. It is rather explained by the shift of American carriers to a higher technology, containerization. "Thus, rather than indicating distress, the decline in the number of the U.S.-flag vessels and the relative ranking of the U.S.-flag liner fleet reflect significant changes in the type of ships used by the U.S.-flag operators to carry their cargo [the change is] * * * also a result of other factors, such as diversification and changing market conditions," pp. iii and iv. Further, the report shows that the average share of liner tonnage carried by American flag ships was higher in 1976-78 than in earlier periods. Finally, the financial viability in the past and prospective financial success in the future have been great enough, in the view of the owners themselves, to justify investing heavily in capital intensive containerships. U.S. Lines in 1982 placed a $760 million order with a Korean shipyard for a substantial new fleet of containerships. The GAO summary comment on this issue is found on p. iv, "Thus, major revisions of the Shipping Act are not required to assure the fleet's existence."

In addition, there is the fundamental issue of whether any industry should be bailed out at the expense of taxpayers or consumers, even if it is in serious straits. Both sound economics and Administration policy lead to the contrary conclusion.

B. The common allegation that the application of the antitrust laws discriminates against U.S.-flag liner operators is also addressed extensively in the GAO report. That analysis finds no bias in enforcement against American carriers; indeed the evidence available suggests a slight bias in the opposite direction, leading to the conclusion, "Thus, the available evidence suggests that the Shipping Act is not being unevenly enforced by the FMC," p. 17.

In 1979, seven members of the conferences in the Atlantic trades—including three foreign companies—were indicted for fixing rates in violation of the antitrust laws. A court approved settlement of approximately $50 million resolved the suit.

It is possible that recent passage by several foreign governments of "blocking statutes," laws making it difficult for the United States government to obtain information from carriers or conferences based abroad, may make enforcement against foreign carriers more difficult. However, there is no evidence in the hearing record, so

far as I am aware, either that those statutes would render the American government helpless or that there has been actual bias in enforcement. The GAO study is the only readily available attempt at serious analysis of the latter issues. Further, the proposed legislation still calls for obtaining information from foreign carriers in the limited enforcement activities it does authorize, [Section 12(d)(3) and Section 14]. Section 15(b)(4) provides for participation by the Department of State in obtaining information located abroad, but does not excuse the Commission from taking action in the event that the data are not forthcoming.

There is a second and, in reality, far more serious aspect of the issue of enforcement discrimination. Present limited application of the antitrust laws does not permit foreign carriers to charge more advantageous prices than American liners. The fact that the present statute precludes maximally effective cartelization of the trades protects shippers from monopolistic prices that might be charged by foreign as well as American carriers. Prevention of monopolistic pricing applies to all members of any market, not just to those sellers in that market who are nationals of some particular country.

C. The question of financial support for the industry has troubled American policy makers at least since the 1930s, when the Merchant Marine Act was enacted, providing extensive operating and construction subsidies for the U.S. liner fleet. The American industry is, in fact, inefficient; that is, its costs per unit of transportation are greater than those of many other fleets. However, that inefficiency is caused largely by high costs of construction in American yards and by high wages of citizen crews and comparatively high levels of manning, all underwritten in the past by the construction and operating differential subsidies. As subsidies are reduced, (as the Administration advocates and the Congress has already supported) there will be financial pressures on American liner companies to reduce costs.

Strengthening the cartels is not a suitable policy response. That, in fact, would reduce pressures on American flag carriers to be efficient. Other policy options are superior:

If other aspects of the Administration's plan—permitting American carriers to buy foreign ships and reducing the underwriting of high crew costs—are carried out, the cost disadvantage of American carriers will be reduced, if not eliminated.

The bail out through monopolistic pricing is an extremely costly way of supporting American carriers. For every dollar of increased profit paid by shippers in the import and export trades, only about 25 cents will benefit American carriers.

There is an argument, discussed below, that stronger cartelization will permit reductions in cost through "rationalization;" to the extent that there is any merit in that argument, it will also benefit foreign carriers more than American operators.

Finally, no industry can be made "more competitive" by making it more monopolistic.

D. The GAO report concurs in the argument that present law and practice contribute to excess capacity and, consequently, to high costs to the liner operators, pp. 8–9. However, the report goes on to point out that among the effects of the current open conference system is the possibility of entry by independents who offer rates below the conference levels, directly benefiting consumers and exporters. Further, its argument relfects the fact that investment is service competition, rather than price competition by conference members, cannot be expected to force returns to equity below those of other investments of similar risk. In other words, service competition does not lead to inadequate earnings.

Second and more important, GAO [pp. 18–22 and appendix II] points out that there are alternatives to the proposed tighter monopolization: more competition which would tend to reduce costs and prices and increased use of such lesser measures as spece charter agreements, pooling agreements and joint service agreements.

Third, reliance on protected cartels to reduce inefficiency is inconsistent with the current drives to rely on competitive markets, although it is consistent with another Administration goal, namely to "minimize government intervention in * * * industry," (comment of the Department of Transportation on GAO report, Appendix I). The argument that government should not intervene is in the interest of American consumers and exporters has not been made explicitly in Administration statements, so far as I am aware.

Fourth, in order for the full gains in efficiency to be passed on to consumers in any market, it is necessary that the market be competitive. The effect of the proposed legislation is to reduce competiton in the American liner trades.

E. It is widely believed that the liner fleet is an important military asset. In fact, the proposed legislation is not responsive to whatever defense needs there may be; the ships needed for defense can be obtained in far more efficient ways.

There is a justification for having merchant marine capacity available for use in military emergencies. However,

The bill would actually reduce the capacity of the American merchant fleet. One of the arguments for the bill is that it would permit "rationalization" of operations and would reduce "excess capacity." This means cutting schedules and port calls and eventually retiring ships to increase vessel utilization. Therefore, if the bill worked at all, it would reduce the capacity available in a military emergency.

Foreign corporations, some of them state-owned, carry three-quarters of the American liner trade. Therefore, if the implementation of the bill were somehow to increse military capability, it would increase the capability of foreign nations about three times as much as it would increase American military reserve capability.

Finally, the reserve fleet, in contrast to the active liner fleet, has been a very efficient means of assuring the required capacity.

F. Enforcement of the antitrust laws has, in fact, led to some controversy with friendly foreign nations. However, it does not necessarily follow that the United States Congress should acquiesce in such pressures. The question of whether the benefits of increased international comity that would be attained through such acquiesence is worth the cost. The hearing record does not address that issue. However, the Administration has been willing to accept substantial criticism from friendly nations on other issues, ranging from the gas pipeline from Russia to western Europe to restrictions on steel imports from our closest allies. A main function of diplomacy is to cope with international tensions such as those that might be generated by enforcement of the antitrust laws. Finally, such enforcement is in the interest of foreign consumers and workers, just as it is in the interest of the American populace. From personal exposure to international transportation negotiation in both the Department of State and UNCTAD, I am intensely aware of the fact that the position of many foreign governments on issues of transportation rates and services is dictated far more by the special interests of the carriers than by the general interest of the public at large.

G. Industry witnesses have, in the past, made the argument that the intent of Congress as originally expressed in the Shipping Act of 1916 has been undercut through misinterpretation by regulators and the courts, including the Supreme Court. It is precisely the role of the courts to interpret congressional intent and the authority of those who would second guess the courts on such interpretation is at best obscure. In any event, the question is not what Congress once intended, but rather what serves the interest of the American public now.

Before leaving the question of the rationale for the proposed legislation, it is worthwhile to point out some general aspects of the problem. Few industries could merit antitrust exemption less. The ocean liner industry has historically operated through cartels dominated by foreign carriers. For over a century, in order to create and preserve their monopolistic positions, the conferences have developed a consistent pattern of abusive, discriminating and predatory behavior. A Justice Department study, for example, identifies five instances of predatory attacks on independent carriers that forced three of the independents out of business. Also, in 1979, seven members of conferences in the Atlantic trades—as already mentioned,—were indicted for fixing rates in violation of the antitrust laws. The alleged activities violated the current Shipping Act as well. In an ensuing civil damages suit, an economic expert estimated the actual damages to shippers to exceed $100 million; the suit was resolved by a court-approved settlement of approximately 500 million.

Further, it is sometimes alleged by advocates of stronger conferences that the industry has the characteristics of a natural monopoly. Actually, the industry is naturally competitive. Its assets are highly mobile, able to serve any market with suitable port facilities. Advocates often, in fact, protest that carriers from other trades move into the American trades because the conferences must be kept open under present law. Although there are large economies of ship size, there is little evidence that large operators or large fleets are substantially more efficient than moderate sized ones. It is such economies of scale of firms, not of individual pieces of equipment, that are relevant in determining whether an industry is naturally monopolistic. Finally, the dry bulk and the tanker trades have survived and, over the long run, grown greatly in highly competitive markets, without significant cartelization.

## POLICY INITIATIVES

Before concluding this statement, which has been largely negative in its observations about S. 47, I would like to suggest very briefly some policy initiatives that might address more effectively some of the problems of the American merchant marine.

Elimination of the essential trade route concept. Merchant vessels are, by their nature, highly mobile. At the same time, demands for liner service vary over time and among markets (trades). Enforcing the concept of the essential trade route tends to inhibit the ability of American liner companies to deploy their fleets promptly in response to variation in demand. Although there are important operational savings that can be achieved by designing some vessels for specific trades, many vessels can be effectively used in more than one trade. Further, removal of the essential trade route concept would provide stimulus for developing flexible ship designs.

Such a change would, in the long run, lead to a reduction in excess capacity with consequent savings.

Partly because of the variability in demand among trades and over time, and partly because the most efficient vessels for the densest routes are very large and costly, there is likely to be some efficiency in more flexible institutional arrangements among liner companies, such as consortia, space charters and pooling of some cargo. Permitting such arrangements where they promise reductions in capital and operating costs and where they would not impair competition looks promising, although further analysis is required before that statement could be made with confidence.

Permitting the American liner companies to buy ships built abroad would reduce their capital cost and make them more competitive with their foreign rivals. That would also provide logistics support for the military services more efficiently than either present policy or the proposed actions under S. 47.

The efficient way to provide large amounts of military reserve capacity appears to be not to seek to manipulate the monopoly practices of foreign-controlled cartels, but to build up the reserve fleet.

The idea of a study commission properly designated and staffed, is highly desirable before major legislative change is made. Bills much like the one under consideration today have been examined by Congress many times in the past and have always been found wanting. It seems appropriate to analyze the problem systematically and objectively before proceeding to enact major changes.

Senator STEVENS. Thank you for summarizing your statement, Dr. Ferguson.

Professor Garvey, we have heard a lot about you. Many of our young staff members are your students. So I am glad to finally see you.

Mr. GARVEY. I hope you are hearing fairly good things.

Senator STEVENS. We are.

Mr. GARVEY. Mr. Chairman and members of the subcommittee, the Shipping Act has set for itself what may be an impossible task, the fostering and creation of a conference system to achieve the benefits of a cartel, which are essentially viewed as more stable service and rates, while also protecting the benefits of competition as embodied in our antitrust laws.

The balance was attempted to be struck always through section 15 of the Shipping Act, which required FMC approval before antitrust immunity would attach to any activities by ocean common carriers acting in concert. The Congress in 1914, the Alexander Committee in particular, found that conferences, although they served a purpose, were inherently abusive and that there was really nothing that could be done to stop conferences from engaging in abusive practices; therefore, they had to be controlled in order to achieve the perceived benefits without subjecting the public to these abusive practices.

In 1961 Congress found that these practices had continued and it stiffened the requirement for approval under the Shipping Act. It added a public interest standard, which has subsequently been interpreted to include very explicitly the policies of the antitrust laws. S. 47 would for the first time, take this entire industry and

exempt it from the antitrust laws, regardless of the activities engaged in, unless it involves an agreement with land-based carriers. Other than that, it is exempt.

S. 47 provides some prohibitions but it removes the requirement that approval be received from a regulatory body and grants instead a blanket exemption. Now, it seems to me that this places reliance on either the conferences or the FMC to adequately protect the consumers of the United States as well as shippers, and I believe this reliance is not justified by past practice.

The conferences have proven themselves to be abusive. Those abuses have continued right up until 1979 when there was a major antitrust violation by the North Atlantic Conference. The FMC has also proven itself not to be a terribly efficient regulator and not to be comfortable with antitrust principles or particularly able to reconcile the conflict between the principles of antitrust and the goals of the Shipping Act.

I believe that the circumstances of this industry have changed so much that, as a predicate to major substantive change, the Presidential Study Commission passed by the House last year would be a wise and prudent step to take. The industry has gone through a technological revolution. There are increases in bilateralism. There is the emergence of the UNCTAD code and a greater worldwide commitment to the policies of competition.

Our competitive policies are not that inconsistent with those of the rest of the world anymore. There are procedural problems. There are enforcement problems. But the basic policies are no longer as inconsistent as they used to be. Finally, I think the experience in other transportation sectors shows that the underlying economics of this policy may not be justified anymore; competition actually works in transportation industries.

If change is going to take place, it seems to me that deregulation should be more radical than S. 47. The FMC spends a great deal of time resolving personal disputes. That is the type of activity that Federal regulatory bodies seem not to be well suited for and it should be left to the private sector if you want to achieve a more commercial merchant marine.

The other and the most important aspect of FMC responsibility is section 15 regulation which was intended to insure some form of workable competition within the structure of the conference system. I think that should be the ultimate goal. Whoever regulates this industry should insure that a workably competitive structure remains at all times, given the benefits that are perceived in the conference system.

That will frequently require a fairly subtle, discrete, and sophisticated balancing that can't be done easily or quickly. I also don't think you can identify precise standards to do that. You need an agency that honestly is committed to the benefits of both the conference system and to competition and you must compel that agency to do what it is supposed to do.

Within the framework of the Shipping Act as it is today, I believe that preapproval should remain. I simply can't conceive of any reason that conferences engaged in antitrust violations under unapproved agreements that also violate the Shipping Act should be released from liability under the antitrust laws.

One final comment, Mr. Chairman. In response to Chairman Green's testimony about the nature of the control that the FMC will exercise—that the act should identify and prohibit all of those activities that are abusive—seems to be misplaced and not to really appreciate what the antitrust laws are intended to achieve. Those prohibited activities are not the main problem by themselves; rather they are ways to achieve monopoly power.

You exclude, you act as a predator, you discriminate to achieve monopoly power. The evil of antitrust is the exercise of that power by limiting service and raising rates, and I don't believe S. 47 addresses that ultimate evil of monopoly, which is the power to raise rates to a supercompetitive level

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF GEORGE E. GARVEY, ASSOCIATE PROFESSOR OF LAW, CATHOLIC UNIVERSITY OF AMERICA

Mr. Chairman and Members of the Merchant Marine Subcommittee, I am George E. Garvey, an associate professor of law at the Columbus School of Law of the Catholic University of America. My primary area of academic interest is antitrust law, including the international aspects of the U.S. antitrust laws. I appreciate the opportunity to testify regarding the antitrust implications of S. 47, the "Shipping Act of 1983."

S. 47 would exempt ocean common carriers, marine terminal operators, and shippers' councils from the U.S antitrust laws. Antitrust immunity would not be limited to conduct approved by the Federal Maritime Commission, as it has been since 1916, and would attach even to covert conduct that is in violation of the Shipping act. This represents a dramatic departure from the generally applicable rule that only meaningful regulatory oversight and approval will exempt concerted private anticompetitive conduct from antitrust scrutiny.

If S. 47 is enacted, independent carriers, small ports, importers, exporters, and ultimately American workers and consumers, could be subjected to monopolistic rates and practices, limited only by the good intentions of shipping cartels and the enforcement policies of the Federal Maritime Commission. Parties that are presently entitled to recover three times the amount of any injury suffered as a result of concerted anticompetitive activities not approved by the FMC will be restricted to actual reparation to be awarded at the discretion of the Commission. I do not believe that history justifies this faith in either the conferences or the Federal Maritime Commission.

Congress has recognized at least since the Alexander Report of 1914 that the conference system, while it may provide benefits, will necessarily result in abuses that can only be prevented by effective government control. The abuses identified as inherent by the Alexander Committee included high and discriminatory rates, shoddy service, indifference to shippers' complaints, and unfair efforts to destroy existing competitors or to prevent entry to potential competitors. Section 15 of the 1916 Act was intended to ensure governmental control by requiring ocean carriers to submit all anticompetitive agreements to the FMC, or its predecessors, for review and approval. Executing an unapproved agreement violates the Shipping Act, and the conduct is not immune from the antitrust laws.

In 1961, the Act's standards for approval were strengthened. The Antitrust Subcommittee of the House Committee on the Judiciary found after intensive investigation that the abuses identified in the Alexander Report had continued without any meaningful government control. Among other things, the 1961 Amendment added a "public interest" standard which embodies the principles of the antitrust laws.

More recent experience demonstrates a continuation of conference excesses. Their most serious antitrust problems have been the result of clearly predatory conduct and convert price-fixing agreements.

I am not suggesting that there is something particularly invidious about ocean common carriers. They have merely engaged in conduct that Congress has long recognized as inherent in a cartelized system. If the ocean shipping cartels become stronger, i.e. are able to fully "rationalize" service in the American trade routes, as contemplated by S. 47, any possible gains in efficiency will ultimately be coupled with monopolistic rates and aggressive exclusionary practices. Profit maximization

is the primary and proper goal of business enterprise and cartels simply cannot tolerate meaningful competition.

Continued, and expanded, reliance on the FMC is also unjustified by past performance. Independent carriers and shippers have complained that the Agency is unreasonably pro-conference. Conference oriented carriers charge that the FMC's standards are vague and that it has consistently impeded combinations that would truly promote efficient competition. Everyone seems to agree that the Commission's primary characteristic has been excessive delay.

Chairman Greene is clearly committed to improving the Agency's performance, but bureaucracies are difficult to tame and many of these undesirable characteristics seem to be as inherent to a bureaucracy as abusive practices are to a cartel.

Mr. Chairman, although I believe that S. 47 would not adequately protect American shippers and consumers, I recognize that the status quo is close to intolerable and that complete deregulation is unlikely. The Presidential Study Commission enacted by the House in the last Congress would be a reasonable predicate to substantive modification of the Shipping Act and would not unduly delay needed change. Several factors have not, to the best of my knowledge, been fully explored. For example, the proponents of major change believe that the competition policies of the United States are totally at odds with those of the European Community. This overstates the differences and ignores some current trends in European policy. A Commission could explore more carefully the similarities, as well as the differences, in policy and recommend changes that would tend to unify the approach of the U.S. and our major trading partners. The Commission could also consider the potential impact of a fully-rationalized, multimodal, containerized merchant fleet on the needs of the military during emergencies and on smaller ports and the economies of the cities they serve.

If substantive changes must be made immediately, I agree with the regulation of the maritime industry: First, the industry is overregulated; and, second, a sensible policy has not been established to reconcile the competitive goals of antitrust and the self-regulatory goals of maritime law.

S. 47 minimizes the most significant function of the FMC, while retaining the most burdensome. Rather than ensuring a reasonably sound competitive structure in this vital industry, the FMC would continue to focus largely on private dispute resolution. The Shipping Act, as administered, has primarily treated symptoms, rather than addressing the basic structural problems of the industry; discrimination and predation are unlikely to exist in a reasonably competitive industry. This emphasis would be increased by S. 47.

Meaningful regulatory reform should shift this emphasis. Private dispute resolution should be left to the private sector, through negotiation, mediation and litigation if necessary, while the federal government ensures a conference structure that promotes efficiency and productive competition. In my opinion, two changes would help achieve this goal without unduly disrupting the existing conference system: adopting a reasonably clear standard and limiting the scope of FMC authority.

I would suggest that ocean common carriers be allowed to file with the FMC any agreement they wish to have immunized from the antitrust laws, and that such agreements result in immunity unless disapproved within a reasonable time. Disapproval would have to be based on a finding that the agreement would unreasonably lessen competition in U.S. trade routes, with full consideration being given to the unique economic and international nature of ocean shipping. Disapproval would be withheld if the carriers could establish that gains in efficiency would outweigh any anticompetitive impact or that the agreement was a reasonable and limited response to a serious economic crisis.

This regulatory burden could be managed, I believe, by a relatively small staff if it was sufficiently sensitive to the benefits of efficient competition and knowledgeable about the structure and nature of ocean shipping. This limited responsibility would fit well into the combined transportation regulatory agency recently suggested by Senator Packwood. I think the combined agency is an excellent idea. A smaller agency with broader jurisdiction is less likely to over-regulate. It is also less likely to become a captive of the industry it regulates. Finally, a single agency could best deal with the broad range of opportunities and problems generated by inter- and multi-modal transportation.

Within the framework of S. 47, I believe several changes would provide substantially greater protection for American shippers and consumers without needlessly impairing the efficiency of conferences.

First, the requirement that antitrust immunity be limited to conduct specified in an approved agreement should be continued. I cannot conceive of any reason to pro-

16-687 O—83——7

vide antitrust immunity for covert conduct that violates both the antitrust laws and the Shipping Act.

I also believe that the public interest requirement should be retained and that the Svenska standard basically represents sound policy. Svenska, however, by placing the burden of proof immediately on the proponents of an agreement, seems to have given antitrust concerns a primacy that is not consistent with the rationale of the Shipping Act. Justice Harlan's concurring opinion would have allowed the FMC to determine, based on its assessment of both transportation and competitive factors, when to shift the burden to the proponents of an agreement. This approach strikes an appropriate balance between maritime and antitrust concerns.

A second major problem would be created by eliminating the section 18(b)(5) requirement that rates not be excessively high or low. A primary purpose of S. 47, as I understand it, is to allow conferences to achieve the efficiency of rationalization. There is, however, no assurance that conference carriers will not shift from efficiency maximizing to profit maximizing. The FMC should be able to prevent a conference from limiting service and raising rates to an excessive level. At some point this conduct would necessarily result in less service than could be provided by an efficient system.

I also suggest that reparation be mandatory. It has been suggested that the amended Shipping Act would provide protection coextensive with the antitrust laws. So long as injured parties are not assured at least a full recovery for their injuries, however, this claim is absolutely untenable. An independent carrier driven from business gets little satisfaction from penalities imposed by the FMC regardless of the amount of the penalty.

S. 47 authorizes the creation of shippers' councils to offset the combined power of the strengthened conferences. Reliance on shippers' councils, however, poses several problems. European councils have recently sought greater regulatory restraints on conference practices. The British Council, for example, has sought to have the EC compel conferences to negotiate. This European experience indicates that shippers do not have adequate concerted power to limit conference abuses.

It may also be difficult to insure fair representation of all shippers' interests by a council. Discrimination between large and small shippers is a persistent vice of the conferences. Section 4(c)(4) is a clear improvement over the bill considered last Congress, but small and medium-sized actual or potential exporters could still fall victim to councils dominated by large shippers unless the councils are compelled to admit all shippers on a reasonable basis and are required to represent the interests of shippers generally.

Finally, allowing American competitors to share the types of cost and market information needed to bargain with conferences would seriously threaten domestic antitrust abuse. The breadth of the antitrust immunity granted by Sections 4(c)(1) and (2) exaggerate the problem. Regardless of legal restraint, however, and the intent of the members, it is not possible for businessmen to ignore facts relevant to their domestic operations because they were obtained in the context of a shippers' council.

Particularly, if the "public interest" standard is eliminated, I believe that loyalty contracts should be limited to a set percentage of the shippers' goods. The British Shippers Council, has suggested that the European Community prohibit loyalty contracts binding shippers to ship more than 70 percent of their goods on conference vessels. This figure seems reasonable because it was suggested by experienced shippers and because it is sufficiently large to allow conference carriers to make long-term plans.

A limitation on the volume of trade that can be tied to conference carriers will insure a market for independent competitors if conference rates become unduly high. Conferences will not be able to ignore market conditions totally.

There is a related tying problem under the proposed legislation. Conferences may enter into exclusive working arrangements with marine terminal operators. It seems, therefore, that conferences could prevent independent carriers from utilizing needed port facilities. This would be a particular concern if containerized facilities were foreclosed to independents. I believe more explicit restraints should be placed on the ability of marine terminal operators to exclude independent vessels from use of their facilities at the instance of a conference.

Ocean common carriers are presently required to file tariffs which are enforced by the government. This requirement would be continued under S. 47. Last Congress the Administration opposed the continuation of this practice. Secretary Lewis testified that this requirement is relatively unique among OECD countries and, in the Administration's view, represents undesirable governmental involvement with the industry.

I believe the Administration's view was correct. If conferences establish their rates and conditions in commercially sound ways, there should be little problem with compliance. On the other hand, if their rates and conditions are unreasonable, they should not have the coercive power of the United States to insure compliance.

Thank you, Mr. Chairman. I would be happy to answer any questions.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

THE CATHOLIC UNIVERSITY OF AMERICA,
*Washington, D.C., February 18, 1983.*

Hon. DANIEL K. INOUYE,
*Hart Senate Office Building,*
*Washington, D.C.*

DEAR SENATOR INOUYE: In response to your request at the hearing of the Merchant Marine Subcommittee on February 2, 1983, I am providing the following written answers to your follow-up question:

*Question 1.* How would you respond to the following?

Unlike domestic surface transportation, demand for international liner transportation is inelastic. Thus the lower prices which competition theoretically brings will not generate more cargo in a trade. Moreover, since ocean transport costs averaged approximately 8 percent of value, significant reductions of such a small cost component would be unlikely to increase the amount of cargo, even if the demand were elastic.

The demand for ocean shipping services is largely a derived demand and the elasticity of demand varies from commodity to commodity. Therefore, while lower prices may not generate increased shipments of some goods, it will for others.

Eight percent of the total value of goods shipped by liners represents a substantial portion of the delivered prices of those products. Even if eight percent was not a significant portion of total cost, that figure understates the actual range of rates set by liner companies and conferences. Ocean carriers charge "what the market will bear" and the greater the rates are as a percentage of value the more responsive demand is to changes in those rates.

In sum, although reduced rates may not substantially increase the shipments of all commodities, it will for certain goods and the net result will be a beneficial increase in trade.

*Question 2.* How would you reply to the following argument for the conference system and other agreements for economic cooperation?

Conference agreements and other agreements for economic cooperation are not confined to the lines engaging in the foreign trade of the United States. They are universally used in the foreign trade of other countries as well as in our own. The exporters of other countries now enjoy the advantages of cooperative arrangements. Making open and cutthroat competition possible among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign counterparts.

Answer. The use of conferences, and other cartel arrangements, has been a widespread practice of the ocean shipping industry, but there has not been a universal belief that exporters derive benefits from these arrangements. Many nations, particularly those without maritime fleets, have persistently sought to limit the power of ocean shipping cartels. All else being equal, open competition should reduce the transportation costs for American exporters and, therefore, give them a relative advantage over foreign shippers.

*Question 3.* How would you respond to the following?

In international ocean liner shipping, the route to reduced unit costs and cargo rates is the attainment of higher loan factors. The ocean liner industry is characterized by a very high proportion (75 percent) of fixed costs. This is the reverse of most industries where only 25 percent of costs are fixed. With this kind of cost structure, far greater benefits can be obtained from high vessel utilization than from increased competition generated by adding to the number of liner services operating in a trade. The latter increases the vessel tonnage operated without increasing the aggregate of cargo tonnage available to be handled, thus increasing the cost of doing business.

Answer. It is in the interest of carriers to have high vessel utilization and eliminating competition helps them to achieve that end. To some extent, however, it is in

the interest of shippers and of the economy in general to have excess tonnage available to handle periods of peak demand.

The problem this statement identifies may be addressed in more effective ways than through the conference system. Meaningful common carrier regulation, i.e. control of entry and rates, could prevent excessive tonnage while protecting the public interest in fair rates. Competition would also ultimately remove that carriage provided by the least efficient ocean liner companies.

*Question 4.* How would you respond to the following?

There are enormous capital and other constant costs in the liner industry. Today, a new container ship costs in excess of $100 million. Not only are the vast majority of costs fixed, but a vessel voyage takes significantly longer than air transport movements. Thus, once the commitment to make a sailing is made, the asset is tied up for a longer period of time, and the need to keep utilization as high as possible increases.

Answer. I agree that it is in the interest of each carrier to maximize utilization.

*Question 5.* How would you respond to the following?

If it is to operate efficiently, the liner industry is far more dependent on the coordination of service than other forms of transport (efficiency=ship capacity in reasonable relationship to the volume of cargo offered).

Cargo cannot move in or out of a trade in short-run response.

Ocean liner service differs from domestic common carriers since the unit in which service is produced (the ship) is much larger in relation to available traffic volume than the units with which domestic carriers produce their service.

Not only is vessel capacity large in relation to total trade-route volume, it is especially so in relation to individual shipments. A container-ship may draw its individual cargo from several hundred shippers.

Answer. Dr. Ferguson is better able to answer this question than I am. I would, however, cite the testimony of Dr. Robert Tollison, Director of the Bureau of Economics of the Federal Trade Commission, at hearings before the House Judiciary Committee last year:

"We do not see anything unusual in the structure or characteristics of this industry that would lead us to differentiate it from other transporters who match buyers and sellers in transportation goods.

We do not see shipping as being radically different than busing, trucking, or delivery of other things in the domestic economy."

*Question 6.* On p. 6 you state that under S. 47, there is no assurance that conference carriers will not shift from efficiency maximizing to profit maximizing.

Suppose that happened. Wouldn't that mean that conference rates would be relatively high, and thus it would be attractive for independents to enter the trade and cut prices?

Answer. If all carriers were equally efficient and entry free, independents would pose a significant threat to a profit maximizing conference. Those conditions, however, are not present in the liner industry. A conference made up of liner companies with the most modern containerized fleets, for example, which enters into exclusive agreements with major ports and utilizes loyalty contracts may be able to exact substantial supra-competitive profits before inducing meaningful independent competition.

*Question 7.* How would you answer those who say that the present regulatory system has created great confusion in the shipping community as to the sorts of shipping activities which are and are not subject to the reach of our antitrust laws? Shouldn't there be certainty? S. 47 answers that question by saying shipping activities are subject exclusively to the shipping laws.

Answer. The claim that the nature and extent of the antitrust exemption available to ocean common carriers is unreasonably confusing is, at best, greatly exaggerated. Common carriers, and others subject to the Shipping Act, are exempt for that conduct specified in an agreement approved by the FMC. This procedure provides ocean carriers with a degree of certainty that other American and foreign businesses engaged in U.S. commerce generally cannot receive. The problems that ocean liner companies have experienced under the antitrust laws have resulted from activities not approved by the FMC; e.g., *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966); *United States* v. *Atlantic Container Lines,* (Criminal Docket 79-0271, 0272, indictment issued June 1, 1979).

Finally, certainty may be desirable, but not at any cost. Denying American exporters and consumers the protection they now enjoy under the antitrust laws from unapproved anticompetitive conference activities is an extremely high price to pay for the "benefits" of shipping cartels. Given the history of conference abuses, which Congress has always recognized as inherent, and the performance of a regulatory

agency that has for most of its existence exemplified the problems of bureacracy, exclusive reliance on Shipping Act enforcement for port, shipper and consumer protection is, in my opinion, unjustified.

I hope these answers will be helpful and please let me know if I can be of any further assistance to you on the Subcommittee. Thank you again for your courtesy at the hearing.

Sincerely yours,

GEORGE E. GARVEY,
*Associate Professor of Law.*

Senator STEVENS. Thank you, gentlemen.

Dr. Ferguson, let me say I don't think we can get into an adversarial cross-examining relationship at this distance. We don't have a judge to arbitrate our arguments anyway. But would you agree that consolidating shipments in order to increase the percentage of available capacity that is utilized in each vessel would be a good goal for consumers?

Mr. FERGUSON. In and of itself if it were done through the competitive process, yes.

Senator STEVENS. If you want to qualify that, go ahead.

Mr. FERGUSON. I was simply going to say that the way it has worked historically through the conference system has not always been to the advantage of consumers and typically has been disadvantageous to them.

Senator STEVENS. Now, historically we didn't have the power of shippers to consolidate, to exempt them also from the antitrust concept so that they could consolidate as this bill would permit them to do, and to consolidate their shipping so that they in fact can have a better leverage position in dealing with carriers seeking all or part of the available capacity in any vessel. I mean they will be able to, I think, eventually dictate the vessels and the timing for sailing under this kind of consolidation from their point of view.

Would you agree that that is in the best interest of consumers?

Mr. FERGUSON. Well, consolidation frequently can be advantageous to consumers, and there are vehicles for it now through freight forwarders and through cooperatives. I am not a lawyer, but both of those, as I understand it, are available.

The problems, it seems to me, that may be raised by the shippers councils are twofold. One, the need for a shippers council or for shippers councils derives from the existence of cartelization in the liner industry. So it is sort of like the subsidization of the tobacco crop and simultaneously spending a lot of money on cancer cures.

Now, you create a problem by strengthening the monopolies and then you undertake to create a partially offsetting institution, but those two institutions, the buyer and the seller, partial monopolies or complete monopolies, will, if they are both, as we assume under the free enterprise system, pursuing their own ends, they will seek to maximize the profit and divide it between them. They will not seek to minimize the costs of delivering products to the benefit of either the exporters or the importers.

The record that I see, that I am familiar with shows no analysis of this problem at all.

Senator STEVENS. Well, we are at different ends of the spectrum. Senator Inouye and I live in island States, in effect. Mine might as well be an island State and his is an island State.

Mr. FERGUSON. It is a beautiful State. I am tremendously impressed with it.

Senator STEVENS. We are happy to have that comment.

When we look at the problem we are dealing with, we see the problem of not utilizing the capacity to the fullest extent, and we see the freight rates that we have endured over the years, and that current system has not led to a reduction of those rates or protection to our consumers, but this bill will in the sense of the savings that will be derived from utilization of capacity and our ability to have what amounts to shippers cartels, will reach out and deal with that capacity on the basis of the best interest of our consumers and consolidate those shipments.

Now, they consolidate the shipments but negotiate with competing lines to obtain the best rates. If we only had one transportation company in the ocean business here in this country, I would agree with you, but we see so many competitors, even in my small State. I think there is competition in the shipping business that you don't realize, notwithstanding the cartelization that is going to come about because of this.

Mr. FERGUSON. Mr. Chairman, I am aware of the existence of substantial competition now. Witness the open rates in the Pacific. Obviously your State suffers from the Jones Act enormously.

Senator STEVENS. That is right. That is another subject, and this bill isn't going to help my State.

Mr. FERGUSON. It isn't going to help you at all in that respect.

Senator STEVENS. Yet.

Mr. FERGUSON. I would be happy to join you in that.

Senator STEVENS. I appreciate your testimony, each of you.

Senator Inouye.

Senator INOUYE. Thank you very much.

Before proceeding I would like to get some clarification. You have indicated in your testimony, Dr. Ferguson, that this measure, S. 47, will reduce port calls, thereby reducing jobs on the docks. Why is it that the American port authorities are in favor of this measure? And furthermore, we haven't heard from any labor organization indicating opposition to it.

Mr. FERGUSON. Well, I cannot give you any simple answer to why a trade association takes any position it takes. That is a complicated political structure. There is, according to press reports, some disagreement among the ports. There was a report, I believe, in the Journal of Commerce in October that a number of the smaller ports were becoming disenchanted with the bill and with the position of their trade association.

I can't tell you why they are not opposed to it. Perhaps it is that the political structure of the trade association is dominated by the large ports that expect that they will be the beneficiaries of the consolidation of port services.

Senator INOUYE. You also indicated that this measure will be disadvantageous to shippers, and we have just heard from an association of shippers here saying that they are in favor of this measure and that it would help them.

Mr. FERGUSON. I heard that, too, and I didn't hear the analysis upon which that is based. It seems to me that again it may depend somewhat upon the structure of the particular trade association.

Again, I am not the person to ask about that, but clearly, if the bill does, in fact, do some of the things that it is intended to do, namely, increase the profits of the carriers and permit them to introduce a number of discriminatory—that is de facto, not de jure—rates, it is clearly going to hurt some shippers.

As I stated, it may very well benefit the large shippers, especially relative to the small ones. Whether one can envisage a political structure in shippers councils that would somehow offset that tendency, I don't know. I think that is betting on a fairly long shot.

Senator INOUYE. I think you had better let the shippers know that they are actually being hurt here. Maybe they are not aware of it.

Mr. FERGUSON. Well, as I mentioned, in the fall I became aware of a number of shippers whose views on this were changing and who, as I would express it, were beginning to realize that there were more problems, more disadvantages to them in this legislation than they had seen, say, a year ago.

Senator INOUYE. Are you concerned that this measure will be disadvantageous to independents?

Mr. FERGUSON. That is not my major concern, no. My major concern is that it will decrease the efficiency of the U.S. economy. That is, the impact on independents, I think, is a likely adverse consequence, but that is by no means my major concern.

Senator STEVENS. Will the Senator yield?

Senator INOUYE. Yes.

Senator STEVENS. Would you disagree with increased exports?

Mr. FERGUSON. I would disagree with that, yes.

Senator INOUYE. Can you describe independents, just for the record? Are there American independents?

Mr. FERGUSON. There are very few. I checked on this last summer, and I believe at that time there were none. Certainly most independents, virtually all independents are foreign carriers.

Senator INOUYE. As of October 26, 1982, they were all foreign, weren't they?

Mr. FERGUSON. I certainly couldn't disagree with that. I think that at some time when I made the check last year, there were none. No American independents. And most of the liner traffic is carried by foreign corporations as well, of course.

Senator INOUYE. You have just heard testimony that the Justice Department has occasionally intervened on section 15 applications, but never, and our research shows never when the applicants were all foreign. Is that fair?

Mr. FERGUSON. I am not an attorney. I am not familiar with that. I could not answer that. The GAO study, as you will recall, looked into the matter of bias and enforcement and found none. Perhaps Professor Garvey would be better qualified to handle that legal question.

Mr. GARVEY. Senator, I don't know if that is necessarily fair. I would hope the Justice Department makes objective decisions about the impact on competition and acts accordingly. I am not at all surprised that they would consider the international implications of proceeding against a combination made up solely of foreign carriers. I think they would be careful about doing that but, if the circumstances demanded it, they should do it.

Senator INOUYE. Isn't it true that as a practical matter, since American companies maintain their headquarters here and their records here, they are more open to Justice Department intervention? As you know, we can't subpena foreign documents. By law they are prohibited to share it with us.

Mr. GARVEY. Senator, that is a problem but it is a problem across the spectrum in antitrust. Some nations don't like the way we enforce our laws and will not allow their nationals to give us documents, and that is certainly true in an international industry like ocean shipping. I think there are things that can be done about that. Those ships may be excluded from our ports if they refuse to comply, it seems to me.

Senator INOUYE. Mr. Chairman, I have a copy of a letter dated October 26, 1982, sent by Dr. Ferguson, chairman of the National Institute of Economics and Law. It is a letter of solicitation sent to independent operators, and I would ask unanimous consent that it be made a part of the record.

Senator STEVENS. Are you familiar with this letter, Dr. Ferguson?

Mr. FERGUSON. Yes, sir. I signed it. I wrote it. If I recall, it was a solicitation for financial support for our activities in opposition to the bill, and we sought their support because we felt that they were a private interest whose interest in this particular instance happened to coincide with the public interest.

It might be worthwhile to state that that is the standard way that we operate. If we find an issue where we think on the basis of our analysis, with the help of our rather prestigious board of advisers, we think we know where the public interest lies, then we seek to get financial support for effectively advocating that position. The realities are that the only way you can get any substantial amount of support for a public interest position is to find private interests whose interests in that instance are congruent with one's own judgment.

Senator INOUYE. I think the record should show that this letter was sent to only independents. Is that correct?

Mr. FERGUSON. That letter was sent only to independents. Other letters were sent to shippers, and I had many telephone conversations. I did not expect any conference members to be interested in providing us with any support. They are obviously the special interest group that stands to benefit most directly from this legislation. So I attribute enough sense of where their own interests lie so that I saved the postage on that.

Senator STEVENS. Did you have any support from foreign carriers?

Mr. FERGUSON. No, sir.

Senator INOUYE. Aren't all independents foreign?

Mr. FERGUSON. Yes, sir.

Senator INOUYE. There are no American independents?

Mr. FERGUSON. We got no support in response to that letter, Senator.

Senator STEVENS. Without objection, we will include that letter in the record.

[The letter follows:]

NATIONAL INSTITUTE OF ECONOMICS AND LAW,
*Washington, D.C., October 26, 1982.*

DEAR MR.———You are undoubtedly aware that the Gorton-Biaggi Bill, the proposed "Shipping Act of 1982" (S. 1593 and its companion H.R. 4374), is pending in the Senate. The bill seriously threatens all independent carriers serving the American ocean trades. The National Institute of Economics and Law is the organization that has organized the major opposition to the legislation. That is why I am writing to you.

The proponents of the bill will make every effort to force it through the Senate during the "lame duck" session, that convenes on November 29 to adjourn late in December. There is a good chance of frustrating those efforts. In light of the facts that the bill is bad legislation and has not been subjected to adequate examination in the Senate—neither the Judiciary nor the Foreign Relations Committees has held hearings on it—the legislation should not be enacted in the rush of a special session. If the bill is not passed in the last weeks of the present Congress, it will almost certainly be brought up in the 98th Congress, next year. At that time, there will be a better opportunity to make its weaknesses and disadvantages clear to a larger public and to more legislators. Further, there are already signs that the coalition supporting the legislation is crumbling.

We, the National Institute of Economics and Law, want to continue to oppose passage of the present bill. However, our activities to date have involved far greater cost than was expected, and we are presently without funds to pursue that important task effectively.

We are soliciting contributions from a number of sources to sustain this and related work in the support of free, competitive markets. As part of this fund raising, we are seeking assistance from many independent ocean carriers who participate in the American trades.

It may be useful to summarize briefly some of the major features of the bill. Many of its provisions are dangerous to independent operators. First, it provides virtually total immunity from the antitrust laws to the ocean freight rate conferences and their members. In the words of the Senate version, conferences could "* * * fix rates * * *; pool * * * earnings, losses or traffic; * * * limit or regulate the volume * * * of traffic * * *; engage in exclusive, preferential * * * working arrangements; control, regulate, prevent, or destroy competition; * * *" [Section 4(a)]. Marine terminal operators are also authorized to engage in similarly anti-competitive activities. All this is permitted without any antitrust constraints and is subject to only minimal Federal Maritime Commission oversight, mostly after the fact.

The greatest threat to non-conference carriers probably lies in four kinds of discounts that are explicitly authorized [Sections 5(d), 8(a), 9(b), (c)]:

Time and volume discounts: Although such discounts could be economically justifiable under competition, under the conference system, they may well be used to suppress competition from independent operators. Special discounts, for example, could be designed to preclude independent operators from topping off with mini-bulk shipments.

Service contracts: With special rates, these can be tailored to the needs of particular shippers and to potential competition from independents.

Loyalty contracts: They have always been designed to prevent shippers from making occasional use of non-conference carriers.

So called "independent action": "Independent action" must be taken through the conferences, subjecting any member proposing an unpopular rate to future vetoes of other proposals. It is entirely reasonable to expect the conferences to use the authority granted in Section 5(d) to develop fighting rates (although fighting ships are prohibited) designed to drive independent carriers out of particular trades. Under the proposed law, only one member of the conference would have to file the reduced "fighting" rate; others, serving slightly different segments of the traffic, could continue to charge the full tariff rate. Further, since pooling of revenues and even profits would be legalized, the "independent actors" could have nothing to lose by slashing rates against outsiders.

Although many of the acts authorized under the pending law are permitted within limits under existing law, the limits are virtually eliminated in Gorton-Biaggi. Further, advanced approval of rate changes by the Federal Maritime Commission is precluded; the burden of proof in any complaint is shifted from the cartel or its members to the protestant, and the penalties and damages for violating the weakened law are reduced.

For all these reasons—and others—we believe that Gorton-Biaggi is not only potentially dangerous to non-conference carriers, but is consciously intended to permit conferences to drive out independents.

I hope that you agree with the Institute that the Shipping Act of 1982—and any of its successors in the next Congress—should be opposed and defeated. We need your support to continue to do so effectively. Since the lame duck session convenes in only one month, we need financial support promptly.

We look forward to your comments and, especially, your support.

Sincerely,

ALLEN R. FERGUSON, *Chairman.*

P.S. I am enclosing a brochure on the Institute, a note on highlights of the bill and several clippings indicating the effectiveness of our opposition to date. We have several other statements and analyses which you are welcome to request.

Senator INOUYE. I have a few more questions here. How would you respond to the following statement? In the event of the price cutting envisioned by open competition, it would not be the efficient low cost carriers who would survive. There are many State controlled carriers in international shipping, and other merchant fleets are so heavily subsidized by their governments and so closely integrated with their governments' national objectives that their operations primarily serve their respective nations' economic, political and military policies. Where this is the case, carriers can afford to operate without regard to traditional profit and loss consideration. In either event, their governments will intercede in the marketplace if they believe that their best interests are not served by the marketplace solution.

Mr. FERGUSON. I didn't get the last sentence, Senator. I am sorry.

Senator INOUYE. In either event, their governments—these are foreign governments—will intercede in the marketplace if they believe that their best interests are not served by the marketplace solution.

Mr. FERGUSON. Well, I have several comments on that. Certainly there are important instances of foreign carriers in the U.S. trades where those carriers are instruments, very open instruments of their governments. We are predominantly concerned with the socialist countries, I think, in this regard, or the Communist countries. They are carrying a very small fraction of U.S. liner trade, and I do not have that number at my fingertips.

As far as subsidies are concerned, our fleet, our American flag fleet is much more heavily subsidized than many of the fleets of the other advanced industrial nations, so those governments or their carriers could make, I think, more effectively, essentially, the argument that you are making.

Senator INOUYE. How would the subsidy our ships receive compare with the protection and subsidies provided by the Japanese?

Mr. FERGUSON. I just can't answer that question. I do not know enough about the Japanese policies. One forms the impression from the newspapers that the Japanese Government supports all of its industries very vigorously, but I am not a student of that.

Senator INOUYE. What about the European countries?

Mr. FERGUSON. There I do know something. In general they do not subsidize their fleets as much as the United States does.

Senator INOUYE. Don't they have any cargo preference?

Mr. FERGUSON. As I said at the beginning of my statement, one of the real dangers is the move toward bilateralism, and certainly cargo preference is a glaring example of that danger.

Senator INOUYE. Hasn't cargo preference been in existence now long before we even considered S. 47?

Mr. FERGUSON. In some trades, yes, but not in all trades and not in most of the U.S. trades. I was, incidentally, at the first of the UNCTAD conferences, at which the UNCTAD code was discussed, and I was tremendously impressed by essentially the political pattern of that conference. The representatives of the governments were in almost all cases either employees; that is, officers of those governments' steamship lines or individuals who are closely associated with those steamship lines, so that my immediate impression was that there are a lot more shipline-owned governments than there are government-owned shiplines.

Senator INOUYE. In an effort to insure that this bill will not permit conferences to engage in predatory practices which would destroy competition from independents, section 12 of this bill enumerates several kinds of concerted economic activities which are prohibited. What specific practices or acts not enumerated in section 12 do you believe should be prohibited to ensure against predation?

Mr. FERGUSON. I don't think you can prevent predation by prohibitions. I think that if we pay any attention to this notion that the government should stay out of business, this is a classic example of it. The minute a law is passed which prevents someone from making money by a particular legally defined action, the people who are hurt by that if they follow it get into the business of hiring lawyers to find ways to accomplish the same end without violating the law.

Many of the clauses in these bills refer to things like particular rate must be available to everyone similarly situated, or some such umbrella phrase. A very large fraction of the practice of the rate men throughout the country is to define—"devine" might also be a good word—to define shippers who appear to be similarly situated and to define them legally as being dissimilarly situated so that they can get a particular break on a rate or on a service.

I just think that I agree completely with Professor Garvey that the way to protect the economy from monopolistic practices is to set up an institutional arrangement in which monopolization is difficult, not to set up an institutional arrangement in which monopolization is facilitated and then try to develop a laundry list of specific prohibitions.

Senator INOUYE. How would you respond to the following? This is a summary of so-called Alexander Committee findings. Without conference agreements, one of two things would happen. The lines would either engage in rate wars, which would mean the elimination of the weak and survival of the strong, or to avoid a costly struggle, the foreign flag carriers would attempt to consolidate through common ownership. Either would result in greater monopoly, which would be far more anticompetitive than any concerted activity that would arise from the open conference system.

Mr. FERGUSON. Well, I disagree with the first clause. I disagree with the import of the first part of that, that competition would force out the weak and thus lead to monopoly. Competition would and indeed should—it is the whole theory of the free enterprise system that it forces out the weak, and by forcing out the weak does not create monopoly in the situation where there is no natu-

ral monopoly, and this is certainly an industry where there is no natural monopoly.

It simply permits the lower cost, more efficient firms to operate and to pass on to their customers the lower prices that are inherent in those reduced costs that they can charge. As long as there is free entry, then they do not have the option, a group of firms that forces out some others does not have the option of going back up to the monopoly price, because if it did, new firms would come in and force the price down.

Senator INOUYE. Somehow your theory just does not apply to a recent development, the deregulation of airlines.

Mr. FERGUSON. Well, I think I would agree.

Senator INOUYE. They are charging prices, some of the prices charged, even assuming that the whole aircraft is filled, cannot cover their costs. Is that not a price war?

Mr. FERGUSON. Well, is there anything wrong with a price war if prices are too high?

Senator INOUYE. Is there anything wrong with a price war if it puts the small and weak out of business?

Mr. FERGUSON. If the small and weak are inefficient, then if you believe in the premises of the free enterprise system, they should disappear from the market. The competitive system is a fairly rough environment. And the consequences of keeping the small and the weak in artificially is—the first consequence is, of course, that the consumers of the service have to pay more than the cost of providing that service to them efficiently.

Now, in regard to airline deregulation, there has been, as you are well aware, a dramatic shift in rate structures so that in some markets rates are now very low and in other markets they have gone up. Those were the markets presumably where under regulation the carriers were forced to serve markets that they could not serve at a low cost.

Senator INOUYE. Well, I believe that as a result of the rate war between American and Braniff, when Braniff gave up, American rates suddenly shot up.

Mr. FERGUSON. I am not familiar with the specific instance.

Senator INOUYE. Well, I can assure you that that is what happened. I fly quite often.

Mr. FERGUSON. Well, did it happen in all of the markets that Braniff and American served?

Senator INOUYE. Where American and Braniff competed.

Mr. FERGUSON. And are the rates now in real terms higher than they were before?

Senator INOUYE. Absolutely.

Mr. FERGUSON. I am not familiar with that particular instance. But one swallow does not make a summer. And there are always examples. I can show on the basis of examples that you can make money in the stock market. Pick out yesterday's closing and I can show you plenty of places you could have made money yesterday.

Senator INOUYE. I have finished.

Senator GORTON [presiding]. Dr. Ferguson, first I would like to thank you for coming today. You obviously knew that you were coming before a group which disagreed with most of the views you

express. And your willingness to do so and to submit a detailed written statement of your reasons are certainly to be commended.

Many of my questions will be based on the written testimony which you already submitted to us, and which I have had a chance to read.

My first question really relates to the end of your testimony which deals with appropriate policy initiatives. If I read that correctly, the only specific suggestions for changes which you make at the present time relate to statutes other than the Shipping Act, which is the subject of S. 47.

Does that indicate that your recommendation to us would be at this time, in the absence of any study commission and in spite of the 68 days of hearings, that you would make no changes in the Shipping Act as it exists now at all if you were a member of this Congress?

Mr. FERGUSON. Well, I am an economist, and I do not think in those terms, Senator. I do not think specifically about the legislative changes that are needed. I certainly do not have any—I am not prepared to say what would be appropriate changes in the Shipping Act of 1916. I would rest myself entirely to the existing substitute legislation for the last few years.

Senator GORTON. In any event, you are making no recommendations now as to amendments to the Shipping Act?

Mr. FERGUSON. That is correct.

Senator GORTON. Do you feel it is an appropriate method of conducting public policy to have a system under which a regulatory commission such as the Federal Maritime Commission can have affirmatively approved a course of conduct which is then later determined to be a violation of the law by another agency of the Federal Government?

Mr. FERGUSON. I think that is inherent in the balance of powers, is it not? Again, I am not a lawyer and I am not a student of political history, but it seems to me——

Senator GORTON. But you are not uncomfortable with having the Federal Maritime Commission approve a particular course of action and the Justice Department decide that it does not like it and that it should be attacked in court?

Mr. FERGUSON. Well, it is my impression in the cases that I am familiar with, that is not the way it is worked. The Department of Justice has made appearances before the Federal Maritime Commission and then has appealed the decisions of the Commission through the courts. And I see no way that we can avoid appeal of decisions, and I think that that is a very orderly practice.

I am more familiar with it in some of the other regulatory agencies. That is, I have dealt with more specific cases and the business of having the other Government agencies appear before the regulator seems to me to be a very good way to proceed. I did that frequently before the Civil Aeronautics Board when I was coordinator for international aviation in the State Department.

Senator GORTON. And did you as the State Department then go to court afterwards and attempt to seek fines or penalties against the winners of the awards?

Mr. FERGUSON. It was not in that kind of context. But by virtue of the fact that we were dealing with the international aspects of

aviation, the Department of State had an appeal directly to the President because the President had the final authority to approve or disapprove CAB actions that pertained to international aviation. And that was the only area I was involved with. So we had an analogous appeal route.

Senator GORTON. I would like to go back to one of the questions with which you dealt in answer to Senator Stevens. And that is the one of rationalization as a general concept. I think that your answer was that the rationalization is a good idea if it is good for the consumers of the particular services or goods which are being offered in the marketplace. Is that not correct?

Mr. FERGUSON. It is awful hard to answer these complex questions yes or no. Rationalization, let me change the word, as part of the problem is with that particular word. Anything that increases efficiency is clearly beneficial to the economy as a whole and is more beneficial if the increases in efficiency are passed on in the form of either increased wages or reduced prices.

So to the extent that rationalization contributes to those two things, then rationalization is a good idea.

Senator GORTON. OK. And I think it is also a part of your testimony that rationalization, at least in the form of fewer shipments and fuller ships, is not only a goal of this act but is an almost inevitable result of it.

Mr. FERGUSON. No, I would not say that. Rationalization in the form of reducing shipping services is I think a very likely consequence. There will be fewer frequencies. This is the argument that the proponents make, and I think it is valid. There will be fewer frequencies. They will tend to consolidate port calls.

Now, the reason that that can be done by a cartel and not by a competitive structure is of course that the cartel does not have to pay the penalty in terms of a price disadvantage to itself of eliminating some of the services that are going to be curtailed.

Senator GORTON. And as a result, the costs of doing business to the members of the cartel will be lessened.

Mr. FERGUSON. The cost of doing business to the members of the cartel should be reduced and the cost to the consuming public may or may not be reduced.

Senator GORTON. Well, as a matter of fact, you predicted that the cost to the consuming public will be increased by about 20 percent, have you not?

Mr. FERGUSON. I have said that that is a likely figure. That is not a consequence of the rationalization, of course. That is a consequence of their ability to set monopoly prices in spite of the rationalization.

Senator GORTON. But, of course, the consequences of those two features of your analysis of this bill combined would be that the profits of the members of these conferences would increase immensely I would take it?

Mr. FERGUSON. I would think so.

Senator GORTON. It would both cost them less money to do business and if they were charging fees of 20 percent more, now would that not under the economic model which you have set up cause these conferences to be overwhelmingly attractive to shipping lines all over the world?

Mr. FERGUSON. Well, that is clearly one of the dangers that the initial efforts to reduce excess capacity and to increase profits, since these conferences would be open under S. 47, which I think is highly desirable, would lead to defeating the purpose of reducing excess capacity. The scenario would go something like this: Rates are increased, and there has been evidence all through last year, particularly in the Japanese trades where as soon as it was possible to get some indication of greater cartelization, rates were increased. Then the next step I would envisage is some of these steps to reduce costs.

Those two things would make the conferences very attractive. That would, in the absence of prohibitions against entry—and those prohibitions would not likely be important in the big trade routes, they would be important I think in the lesser routes—in the absence of effective prohibitions against entry, new carriers would come in. The powers to pool, to allocate revenues, allocate ports would have to be called into play. So that ships would again operate at lower than desirable load factors and——

Senator GORTON. Which is something of a description of competition, is it not?

Mr. FERGUSON. No, sir. The difference is that with the cartel you can allocate ports, pool revenues, and thus keep the inefficiencies inherent in the excess capacity being covered by price. In competition the excess capacity would be competed away essentially as the first part of the Alexander report statement that Senator Inouye mentioned predicted. So with competition you would get lower cost and lower prices.

Senator GORTON. With respect, it seems to me that when you have posited the situation in which there is both less in the way of service and considerably higher prices and that you would attract a large number of new members into the conference. You would almost certainly attract independent action on the part of some members of that conference and almost certainly the independent carriers who would be unsuccessfully solicited. And either that is the definition of competition or it makes it highly unlikely the prediction that prices would go up 20 percent as long as there are a large number of carriers in the world, the attraction of the profits under circumstances like that, it would seem to me at least inevitably to get so many people into the trade that prices would be forced down or more likely not forced up in the first place.

Mr. FERGUSON. With the pooling powers that are granted I think in S. 47 I honestly do not. I think they are still in S. 47. They certainly were in the previous bills. With the pooling powers there is no mechanism to bring the price back down. The mechanism is simply to allocate the available profits albeit perhaps a shrinking volume of available profits among the participants.

And also, the so-called independent action is not, as I read the bill, genuinely independent action. It is action that must go through a process in the conferences. And it seems to me that it is at least as likely that the power of independent action will be used to discriminate against, albeit not necessarily legally discriminate against, independent carriers or anyone else who would impair the monopoly position of the conference carriers.

This is exactly what happened in the airlines prior to deregulation. It is exactly what happened in the motor carriers. The freight rate bureaus in the motor carriers set rates above the competitive levels. Excess capacity moved in, and it was the rate bureau's job to allocate—not literally to allocate—it was the rate bureau's job to keep those rates at a high enough level to cover the excess cost of the firms that were in the particular trade. And their costs were excessive by virtue of their having excess capacity. That has happened again and again in the transportation industry.

Senator GORTON. Doctor, can you compare for me the costs of shipping in international trade between the United States and its various trading partners now with other comparable international trade between the free nations of the world? Is the cost of the carriage of goods from the United States to Europe or Japan greater or lower than the cost of carriage of goods from Canada to those areas or from Japan to Europe?

Mr. FERGUSON. Well, as in any other situation, we are talking about, there is probably equality at the margin. But this is an extraordinarily difficult empirical task because a movement from Halifax to Liverpool is competitive with but is not identical to a movement from New York to LeHavre. And with the multiplicity of rates, I think it would be a major undertaking to try to get a realistic answer to that question.

Senator GORTON. So the real answer is you do not know? There is no way to make those comparisons?

Mr. FERGUSON. I think there is no way to make those comparisons, and I do not think that in terms of evaluating this kind of legislation one needs to make them. What one needs to do in evaluating this legislation is to look at the question of how would those relationships change. Would this legislation, as I think, increase the New York-LeHavre cost relative to the Halifax-Liverpool cost, or whatever the example was.

That is the important question. If the answer to that is yes, then you draw one conclusion. If you think that it would reduce that rate, then you draw another as far as the efficiency of the trade is concerned.

Senator GORTON. I would agree with that analysis, though I think that one might perhaps, in respect to my next question, make some judgments as to which direction those prices would go by examining the laws and practices in other countries. And with that, I ask you whether or not Canada has a regulatory system in the enforcement of domestic antitrust laws in international commerce that is similar to our own?

Mr. FERGUSON. I am not familiar with Canadian antitrust laws.

Senator GORTON. Does Japan?

Mr. FERGUSON. I am not an expert in foreign antitrust laws at all.

Senator GORTON. Does Great Britain?

Mr. FERGUSON. My impression is that some of the Western European countries, Germany in particular, has strong antitrust laws and is moving to strengthen them.

Senator GORTON. And to enforce them against the international carriage of goods, against, for example, American shipping, American carriers?

Mr. FERGUSON. I spoke with the Minister of Transportation last summer, and he indicated that they were trying to, that they were considering whether they could not take that action. I believe at this point they do not.

Senator GORTON. Then would you say that it would be appropriate for us to attempt to determine whether nations which operate under systems of the regulation of the international carriage of goods more like those of S. 47 than those of the United States have rates which are lower than most of our own, would that be a reason to move in this direction? Or on the other hand, if they are much higher under the circumstances of those other countries to oppose this legislation, would that not be a fruitful inquiry?

You have told us in theory that if we stop enforcing antitrust laws, that the cost of carriage of goods is going to go up 20 percent.

Mr. FERGUSON. It is going to go up.

Senator GORTON. My understanding is that few, if any, of those other nations enforce antitrust laws. Under these circumstances, should we not then expect the cost of goods shipped by them with other countries without such laws to be 20 percent higher, roughly, than our own?

Mr. FERGUSON. No, you cannot make that comparison. I think we can say quite confidently that in some of the trades where there is restriction to entry, the costs are above the competitive level. I do not think there is any question about that. That is the purpose of restricting entry. And that is the purpose of this new bilateralism.

Now the question is do we feel any compunction to repeat everybody else's mistakes. If other countries handicap, as my experience at the UNCTAD meetings suggest, handicap their own workers, their own consumers, their own farmers for the sake of their own shipping lines, should we do so too? And I think the answer is clearly no.

I think another question is if we do know something about the way the economy works—we may not know as much as we used to think we know—but we do know that in general if you give the people the power to cartelize, they will cartelize. And that means an increase, a combination of an increase in the cost and reduction of the services. And if we pass a law which permits that to happen in the U.S. trades and nothing else happens anywhere else, then the rates cost in the U.S. trades will rise relative to the cost in other trades. And that is what will lead to the major adverse impacts on exporters and jobs and so on.

Senator GORTON. But you are telling me that an increase will happen even if we have examples in which antitrust laws are not even utilized at all and in which present costs are lower than American international trade. I must say I find that to be something of a paradox, as I do one other area. I am not here to criticize the way in which your organization operates, by any means. In connection with this letter that was submitted, you did tell us that you got no response to the letter.

Mr. FERGUSON. That is correct. I got no favorable response.

Senator GORTON. No favorable response.

Mr. FERGUSON. I did not get much response.

Senator GORTON. Which I might take to mean that the recipients of the letter do not have the same sense of their own interest

which you have. I seem to get that from a considerable additional amount of your testimony.

As you know, this bill has stronger shippers councils in it or shippers rights in it than did the bill, the so-called compromise bill at the end of the last session, although rather consistent with the original Commerce Committee bill.

And I think it is fair to summarize your testimony in saying that at best you think that these provisions will be ineffective to create greater competition or better prices for consumers. But would it be fair to say that your analysis of the testimony of the two people who preceded you at that table is that they do not know their own interests? They represented small shippers. You are absolutely convinced the small shippers will be penalized. They think that they will be helped.

So I take it that it is your testimony that they do not know what they are talking about in the interest of their own people. By the same token, your testimony says that there may be certain large shippers who are benefitted by this bill, and yet it is one of those large shippers or groups of those large shippers, CMA, that you have now said are leaving the alliance in favor of this bill.

So I take it that the large shippers, at least that group of large shippers, do not have a sense of their own interest either. Would that be a fair comment?

Mr. FERGUSON. I would not call it fair.

Let me say that I would say I disagree with the two previous witnesses. I am certainly not going to say that they do not know where their interests lie. I disagree with them as to where their interests appear to lie.

I do not know whether the Chemical Manufacturers Association is made up solely of the very largest shippers. And I am not talking simply about small shippers. These discounts, particularly the independent action, the volume discounts, and the service contracts, I suspect are likely to work predominantly in favor of a very small number of very large shippers in each particular trade.

The middle-size shippers, like the small shippers, will also be set at a disadvantage, I predict.

Senator GORTON. Mr. Garvey, during the course of his answers to questions from Senator Inouye, Dr. Ferguson did say something which attracted my attention. That was a list of prohibitions contained in a regulatory statute of this sort are never effective because of the genius of the profession of which I am a member, in part, at least.

I must say I have a rather strong tendency to agree with him. Yet, you are the lawyer on this panel, and I believe that your testimony in criticizing the bill or suggesting changes to the bill wants a return to some of the more generalized prohibitions or standards which are contained in the present law. And I wonder if I could get you to comment on that answer which Dr. Ferguson made a few moments ago.

Mr. GARVEY. Yes, Senator. I think the experience under the antitrust laws all along has been that it is impossible to identify specific conduct which is unreasonably in restraint of trade and not leave out things that are unreasonably in restraint in trade. As

fast as you identify things, the business world finds new restraints which are every bit as offensive.

I think that has been the experience under antitrust. The Sherman Act, in particular, is an inherently vague statute, and it has stayed that way because Congress has never found a better way to say those things. It has therefore left it to the courts to determine what is an unreasonable restraint or what amounts to an illegal monopoly.

I believe that this applies in this industry as well. No matter how carefully you try to identify all of the abusive actions that have been done in the past and to anticipate what the conferences may do in the future, they will think of other things to do, called something else, that have the same effect.

Senator GORTON. Yet we face the paradox, of course, that just exactly to the extent that we are imprecise and general in these statutes, that we do greatly enrich our own profession and greatly reduce the certainty with which businesses can operate at any profession, do we not?

Mr. GARVEY. It certainly builds in some uncertainty, and it makes work for lawyers, I cannot deny that. Over time, however, rules develop, and if you have a competent, knowledgable regulatory body, it can help to bring life and put flesh on those rules.

Senator GORTON. Do you, I take it then from Senator Stevens' comment to you when you first came, do you teach antitrust?

Mr. GARVEY. Yes, I do, sir.

Senator GORTON. Do you feel that there is any rational ground for distinguishing between antitrust laws as they apply to essentially the internal commerce of the United States from the way in which they are applied to commerce in which other countries have at least an equal interest to our own where those nations have a quite different legal system or attitude toward antitrust laws? I am speaking very much in general now.

Mr. GARVEY. Yes. I think an accommodation has to be made. Other issues come into play that are not present when you have totally domestic commerce. The courts have developed standards that can deal with that. The comity approach of the *Timberlane* case, for example, requires the courts to look at the interests of both nations and decide whether or not to proceed with the case.

Senator GORTON. Do you have any specific changes that you would make in the Shipping Act right now at the present time?

Mr. GARVEY. Working within that framework, which I really do not much care for, I think the single biggest problem is the burden of proof imposed by the *Svenska* case on the proponents of an arrangement and this could be remedied by simply shifting that burden. I said in my written testimony, as Justice Harlan stated in his concurring opinion in *Svenska*, the FMC should determine, after considering transportation as well as antitrust standards, when the proponents of an agreement should come forward and justify what they seek to do. In my judgment, that would do it.

Senator GORTON. On the same general question, Dr. Ferguson, I am looking now at page 7 of your written testimony. I think you might write that last little subparagraph differently if you had it to do again. You say the facts that one motive is to avoid disagreement with foreign governments—and then three asterisks here—it

raises questions of the propriety of the legislation as an instrument of American policy.

Are you telling us that the concerns of foreign governments are never appropriate concerns of American government policy?

Mr. FERGUSON. Let me reread that paragraph.

Mr. GARVEY. Could I comment on that, Senator, while Dr. Ferguson reads that?

Senator GORTON. Certainly.

Mr. GARVEY. One of the problems I have is that S. 47 still imposes the policies of the United States on foreign carriers through the Shipping Act, and if they violate any of these things which are supposed to be coextensive with antitrust restrictions, they will, in fact, be subject to penalties and possibly greater penalties under the Shipping Act. So I don't think this is removing foreign carriers from the reach of the policies and laws of the United States. It is shifting them from antitrust to shipping.

Senator GORTON. That is a good point.

Mr. FERGUSON. I think if I were to write this from scratch I would be inclined to scratch that paragraph. I would either scratch it or write three or four pages.

Senator GORTON. Thank you both.

Senator Inouye.

Senator INOUYE. Gentlemen, I would like to thank Dr. Ferguson and Professor Garvey for participating in this hearing because I think it gives us a better perspective of what we are dealing with. However, in the years I have been serving on this subcommittee, many things have been brought to my attention that just don't sit too well, and I would like to preface that by saying that I come from a State that lived under monopolistic economic systems for many, many years, so I know what a monopoly is, and obviously, I am not for monopolies.

However, much as I am in favor of competition and providing the best deal for the American consumer, it rubs me the wrong way when I know that at this time the U.S. mail is not being carried by American carriers. That in the Atlantic Ocean it is carried by Poles. I suppose their ships are much more efficient than ours, I don't know; but they can always underbid us in the name of competition. We open it up to bid.

Not too long ago, as part of the urban mass transit program where Federal funds were provided for buses for large communities, we permitted a city in Texas to open this up for bid and a German concern got the lowest bid. So it was constructed in Germany. Then the time came to ship these buses back to Texas, and the company that showed interest was the Baltic Steamship Co., which is Soviet flag.

The Lykes Steamship Co. wanted to carry the buses, if only for the sake of having an American flag carry American buses, paid for by American taxpayers. I think they went through the negotiating and bidding process, and then in the end they just couldn't compete because everytime Lykes came down to the bare bones, the Russians always went down 20 percent lower, and I suppose it would have continued all the way down to almost zero.

Is that the type of situation that should be supported in the name of open competition? And the other thing that concerns me is

that much as we want peace, there is always a possibility that this country, through some mistake of one kind or another, or some stupidity on the part of someone, will get involved in a war. We have no hospital ships, we have no troop carriers, we don't even have the *Queen Elizabeth* to carry our troops to the Falklands. As you know, we don't have any passenger vessels in the Atlantic, the Caribbean, or the Mediterranean. We have two in Hawaii.

Is that a situation that we should support?

Mr. FERGUSON. Well, I can make a comment on part of that, and let me pick up your last part, the lack of troop carrying capability, and preface it by saying I spent 5 years as head and deputy head of the Logistics Department at the Rand Corp. so I have some familiarity with some of these problems as they existed some while ago.

I think that is a deplorable situation. I don't think that this bill will do anything to improve it. I think that if we need a military reserve fleet, we should go buy a military reserve fleet. We are not going to get troop transports by converting enormous container ships.

Senator INOUYE. What about cargo transport?

Mr. FERGUSON. Cargo transports we can get more effectively by putting them in the military reserve, and you can't have your cake and eat it. You see, you can't effectively as a matter of sensible military policy rely upon pulling ships off the commercial routes in time of war to do logistic support work because at exactly the time, if it is a war of any proportions, even as big as the Korean war, exactly the time you need the ships for logistic support, you need increased capacity or at least more service to support the industrial base. So this is something of a snare and a delusion to think that by providing a few ships in commercial service, you are building up a military reserve that will not in itself be disrupted.

The other thing is that if the rationalization works that this bill is supposed to bring about, one thing it will do is reduce excess capacity. That means it will reduce capacity. That means that the number of ships available for the military reserve will be reduced, not increased, the carrying capacity will be reduced. So this just doesn't address that problem at all.

Senator INOUYE. What about the mail?

Mr. FERGUSON. Well, I must say my history of involvement in a number of things such as the Rand Corp. leads me to question the wisdom of having American mail moved in Polish ships, but is that a liner problem or is that a contract problem? It sounded to me like a bid on a special contract, not an operation under a conference published tariff. In fact, if it were under a conference tariff, I don't see why it would all go to the Polish ships.

Senator INOUYE. It is a mail contract.

Mr. FERGUSON. Is that addressed in this bill? I didn't notice it.

Senator INOUYE. I think the whole philosophy is addressed in this bill.

Mr. GARVEY. Senator, could I just respond to your first question?

Senator INOUYE. Yes.

Mr. GARVEY. I share your concern about the possibility that essentially socialist state owned and highly subsidized fleets may weaken our merchant marine. I think the control carrier provisions take care of that. I am not familiar with all of the elements

of that provision but I certainly don't mean by anything that I have said that regulation of controlled carriers is inappropriate.

Senator INOUYE. You weren't around here when we were struggling to get it passed. The Government opposed it. The Justice Department opposed it. Professors opposed it. We look like a bunch of demagogs here pushing this forward.

Mr. GARVEY. Well, as I say, I don't know what all of the provisions are, but the concept doesn't disturb me.

Senator INOUYE. Once again, I would like to thank you, Professor Garvey and Dr. Ferguson. For me it has been very helpful. Thank you.

Mr. FERGUSON. Thank you.

Mr. GARVEY. Thank you.

Senator GORTON. Thank you both.

The final panel will be Mr. Klein, Mr. Sayre, and Mr. Blank. If you will speak in that order, we will withhold our questions until all of you have made your formal statements.

**STATEMENTS OF CLIFFORD M. SAYRE, DIRECTOR, INTERNATIONAL DIVISION, MATERIALS AND LOGISTICS DEPARTMENT, DU PONT; JONATHAN BLANK, COUNSEL REPRESENTING COUNCIL OF AMERICAN-FLAG SHIP OPERATORS; AND PETER KLEIN, VICE PRESIDENT AND GENERAL COUNSEL, SEA-LAND INDUSTRIES INVESTMENTS, INC.**

Mr. SAYRE. Senator Gorton, we would like to thank you for permitting our panel to appear here today. I will start our presentation and will be then followed by Mr. Blank and Mr. Klein, if that is acceptable.

Senator GORTON. Very well.

Mr. SAYRE. We will try to keep our presentation as brief as possible.

My name is Clifford Sayre and I am director of the International Division of the Du Pont Co.'s Materials and Logistics Department. Du Pont, as Mr. Boyle told you earlier this morning, is also a member of the Shippers' Coordinating Committee on Maritime Reform. That organization represents the merchandise exporters and importers of the United States who are the consumers of ocean liner services and a $200 billion plus industry.

Of course, I cannot possibly represent the specific diverse interests of thousands of companies and individuals, but what I can emphatically speak to is the shipper side of the shipper-carrier compromise. That compromise has been explicitly endorsed by 80 percent of those who import and export goods in the United States.

I was a direct participant in months of negotiation. That process had its genesis with your committee and produced specific facets of the consensus measure voted out as S. 1593 in the last Congress by your committee. It was also passed by an overwhelming majority of the House as H.R. 4374.

Now, the legislation being considered at the close of the last session was not any shipper or carrier's first choice, but it was a reasonable compromise, a balanced measure, which represented considerable improvement over present law and preserved the ability of shippers to purchase safe ocean liner transportation in a compet-

itive marketplace while improving the ability of the American-flag carriers to meet foreign competition.

Shippers are a very diverse lot, but they were able to rally behind three highly procompetitive features of the legislation: the preservation of open conferences in U.S. trades, the mandated right of independent action within the conference system, and the legislated right of shippers and carriers to enter into contracts for specified levels of service. I think the record is clear before this committee and others as to the constancy of shippers in seeking this quid pro quo for changes in law sought by the carriers.

We believe that with the consensus measure we had at the close of the last session, that we had achieved the necessary balance. Now, the legislation before us today, S. 47, preserves open conferences. It mandates independent action in those conferences with loyalty agreements and it provides for shippers and carriers to enter into service contracts.

Additionally, operating to the benefit of shippers are provisions that provide for an accelerated regulatory process which will invite innovation, pooling and rationalization, which can yield efficiencies and result in more competitive rates for shippers, an improved understanding of loyalty contracts, which will better match shipper needs with carrier capabilities, and the authorization of activities which can create truly efficient intermodal transportation systems to serve world markets.

Now, Mr. Chairman, this solution is not perfect but it is good, and it represents a balance which improves the lot of the suppliers of ocean transport and the consumers of that service. It can be further improved, we believe, by moving closer to the consensus that we had achieved at the close of the 97th Congress.

Quite frankly, issues outside the scope of the shipper-carrier compromise were addressed in the consensus measure and the procompetitive nature of those provisions brought forth very broad shipper support. I will be happy later to elaborate on that, and I believe that you will shortly receive letters from both the Chemical Manufacturers Association and the National Industrial Transportation League outlining those provisions which they think are essential to be restored.

Now, there are those who have testified that this is special interest legislation. I would submit it is public interest legislation. As the President noted in his state of the Union address, we must be more competitive in international trade, particularly since 20 percent of our manufacturing capacity is aimed at export markets. In my own company, for example, one out of six of us owe our jobs to the export markets.

Competitive exports and beneficial imports simply add up to more jobs, lower cost for consumers, and a healthier economy. A balanced measure gives shippers and carriers, suppliers and consumers opportunities to improve efficiency and productivity in America's international trade. Therefore, we believe maritime reform legislation is in the public interest and deserves strong support.

Thank you once again for giving me the opportunity to appear. We would like to continue to work with you and your staff to see the intent of this important legislation realized.

[The statement follows:]

STATEMENT OF CLIFFORD M. SAYRE, DIRECTOR, INTERNATIONAL DIVISION, MATERIALS AND LOGISTICS DEPARTMENT, E. I. DU PONT DE NEMOURS & CO., INC.

Thank you for inviting me here today. My name is Clifford Sayre and I am Director of the International Division of the Du Pont Company's Materials and Logistics Department. Du Pont is also a member of the Shipper Coordinating Committee on Maritime Reform, the merchandise exporters and importers who are the consumers of Ocean Liner Services and a $200 billion dollar plus industry. Of course, I cannot possible represent the specific diverse interests of thousands of companies and individuals.

What I can emphatically speak to, however, is the shipper side of the shipper-carrier compromise. That compromise has been explicitly endorsed by 80 percent of those who import and export goods in the United States.

I was a direct participant in months of negotiation. This process had its genesis with your committee and produced specific facets of the consensus measure voted out as S. 1593 in the 97th Congress. It was also passed by an overwhelming margin of the House as H.R. 4374.

Legislation being considered at the close of the last session was not any shipper or carrier's first choice, but it was reasonable compromise, a balanced measure, which represented considerable improvement over present law and preserved the ability of shippers to purchase safe ocean liner transportation in a competitive marketplace while improving the ability of the American flag carrier to meet foreign competition.

Shippers, as diverse a lot as you will ever want to meet, where able to rally behind three highly pro-competitive features of the proposed legislation:

The preservation of "open" conferences in the U.S. trades;

The mandated right of "independent action" within the conference system; and

The legislated right of shippers and carriers to enter into contracts for specified levels of service.

The record is clear before this committee and others as to the constancy of shippers in seeking this "quid pro quo" for changes in law sought by the carriers. We believe that with the consensus measure being considered at the close of the last session that we had achieved the necessary balance.

The proposed legislation (S. 47) preserves "open" conferences. It mandates "independent action" in those conferences with loyalty agreements. It provides for shippers and carriers to enter into service contracts.

Additionally, to the benefit of shippers, are provisions that provide for:

An acelerated regulatory process which will promote innovation;

Pooling and rationalization which can yield efficiencies and result in more competitive rates for shippers;

An improved understanding of loyalty contracts which will better match shipper needs with carrier capabilities; and

The authorization of activities which can create truly efficient inter-modal transportation systems to serve world markets.

Mr. Chairman, this solution is not perfect, but it is good; and it represent a balance which improves the lot of the suppliers of ocean liner transport and the consumers of that service. It can be further improved by moving closer to the consensus we had achieved at the close of the 97th Congress. Quite frankly, issues outside the scope of the shipper-carrier compromise where addressed in the consensus measure. The pro-competitive nature of those provisions brought forth very broad shipper support.

There are those who think this is special interest legislation, I would submit it is public interest legislation. As the President noted in his State of the Union address, we must be more competitive in international trade, particularly since 20 percent of our manufacturing capacity is aimed at export markets. In my own company, one out of six of us owe our jobs to the export business. Competitive exports and beneficial imports add up to more jobs, lower costs for consumers, and a healthier economy. A balanced measure gives shippers and carriers, suppliers and consumers, opportunities to improve efficiency and productivity in America's international trade. Therefore, maritime reform legislation is in the public interest and deserves strong support.

Thank you once again for giving me the opportunity to appear. We would like to continue to work with you and your staff to see the intent of this important legislation realized.

Senator GORTON. Thank you.

Mr. Blank.

Mr. BLANK. Mr. Chairman, if I might, I might depart somewhat from my prepared statement in the interest of time, and I would like to take a little of that time to respond to some of the things we have heard this morning.

My name is Jonathan Blank and I am a member of the law firm of Preston, Thorgrimson, Ellis & Holman, and I have been designated to speak on behalf of the Council of American-Flag Ship Operators. The 7 members of CASO operate 147 vessels and represent 75 percent of the American-flag ocean common carrier fleet.

We have supported various attempts throughout the past several years at legislative reform of the Shipping Act. S. 47 is an iteration, a variation on the same kind of legislation that we have supported all along, and our support for it is generic. We believe that it is a good bill.

All the members of our group have not had an opportunity to review some of the particulars of S. 47. We do stand behind the general thrust of the legislation.

I do feel it is important to refer to one particular section of the bill, section 4(c)(4), involving shippers' councils. We endorse the comments made by Mr. Klein in his prepared testimony.

Apart from that, I think it is appropriate to say, if I can deviate from my prepared statement, that I think there are a few things that are very important to recognize about this bill. First of all, we simply don't view it as a bailout of the American merchant marine. It has been very clear that the American merchant marine is probably the most innovative merchant marine in the world and has been over a period of years.

Containerships, as well as various other innovative vessel types, have originated with the American merchant marine. We don't think it is a question of bailing out; rather, we think it is a question of making a regulatory scheme that is rational for the current situation that we have.

We think that the bill will reduce uncertainties and allow us to operate our industry in a much more predictable fashion. We think that is the primary benefit of the bill. We do not think it is going to bring about tremendous increase in shipping costs. I think if it were likely to do so, Mr. Sayre simply wouldn't be sitting next to us.

I think that you have to rely on shippers to know their own interests. Dr. Ferguson said that one swallow does not make a summer. I think that is correct and I think that really illustrates exactly from where the several billion dollar figure and the 20-percent increase which he alleged would be caused by the bill came from.

If you will recall, about the time that we were working on this legislation over on the House side, CAST, which was operating between Canada and Europe, and still is operating between Canada and Europe, made some basically bad management decisions. The bulk shipping market went down. As a result, it decided that it would join the conference. The conference between Canada and Europe then raised their rates, since there was a diminution of independent competition.

However, most of the executives of CAST got out and left CAST and formed a new independent shipping company, Sofati, which is now operating. CAST got back out of the conference and the rates came back down. I think in fact one swallow did not make a summer. That is why Dr. Ferguson's allegations of the 20-percent increase were based on fiction, not fact.

This is an industry characterized by low barriers to entry for low quality of service operations such as Sofati and CAST. These carriers produce an effective restraint on the ability of conferences to extract monopoly profits. I am aware of no studies, and I think I read everything that comes along concerning economics of shipping, no empirical studies which indicate that this industry has the opportunity to extract monopoly profits from shippers even over a relatively short term.

There are no restrictions on entry contained within the Shipping Act. So long as there are not, there will not be an ability to extract monopoly profits and to make enormous profits and drive rates up; and if there were, I don't think that Mr. Sayre would be sitting next to me.

I would also like to address myself to the question of small ports because it is an issue with which I have some familiarity. The allegation by Dr. Ferguson that the American Association of Ports Authorities does not adequately represent small ports is simply not sustainable.

As all of us who have been through the user fee controversy know, the small ports have a lock on the organization, and the large ports are not able to ride over the small ports within that organization. The small ports have been effectively able to stifle any attempt to resolve the user fee issue within the organization, and the big ports went out and formed their own association apart from the AAPA because they had their own separate interests that they wanted represented.

In fact, those of us working on a bill, and the staff on both the Senate and the House side, worked with the ports. It was very clear what the small ports were interested in during the negotiations that led to the passage of the House bill and to the formulation of the Senate bill on this side. They wanted the continuation of tariffs on carriers, conferences, and ports. That is in this bill.

The small ports wanted the existing antitrust immunity kept. In fact, the large ports, including the Port of Seattle, would have been happy with the removal of all antitrust immunity for port agreements. It was kept in the bill at the insistence of the small ports, not the large ports.

Finally, the small ports wanted the provisions on port discrimination retained in the bill, and in fact they are retained in section 12. The Port of Seattle and the Port of New York would have been most happy to see those provisions eliminated. The large ports did not support those. The small ports got their way in this bill.

I just don't think that Mr. Ferguson knows the small port business better than the small ports. As you know, during the last session his institute prepared a paper involving ports. It was quite controversial. The AAPA said that it was poorly researched, and I think that was correct. The AAPA stated that:

The NIEL study ignored the fact that supposedly port-debilitating powers contained in the legislation are already permitted under the Shipping Act and it has generally performed satisfactorily in allowing the ports to protect themselves.

Second, the AAPA is well aware of the concerns that ports of various sizes have regarding existing conference service. However, neither bill would change the existing practice that allows conferences to decide which ports are served. Those decisions would continue to be based on cargo flows and the capacity facilities in individual ports to handle the cargo to attract the traffic.

Those ports that have sufficient cargo will attract sufficient vessels.

Finally, I think it is appropriate to say that on the issue of rationalization, the American carriers tend to operate at the higher end of the sale quality of service scale. They are the best operators. They operate generally new, modern, efficient vessels and I think the fleets are going to be getting newer and getting more modern, especially in the large trades. They can use rationalization and the conference system to have stability of rate structure. That enables them to plan and maintain their high quality of service.

On the other hand, the existence of nonconference competition, and the existence of independent action within conferences, will prevent them from extracting monopoly profits from shippers. So I think that, as Mr. Sayre as well as most of the shippers that we have worked with, I think largely at the instance of the Senate subcommittee last term, believe this bill really represents the combined interests of the shippers and the carriers. Without their support we would not have gotten this far. We would not be here. I think the shippers really ought to be allowed to speak for themselves.

[The statement follows:]

STATEMENT OF JONATHAN BLANK ON BEHALF OF THE COUNCIL OF AMERICAN-FLAG SHIP OPERATORS

Mr. Chairman, my name is Jonathan Blank. I am a member of the law form of Preston, Thorgrimson, Ellis and Holman, and I have been designated to speak on behalf of the Council of American-Flag Ship Operators. The seven members of CASO operate 147 vessels and represent 75 percent of the American-flag ocean carrier liner fleet.

In the two years that we have been engaged in an attempt to secure a new regulatory program for the ocean liner industry, we have seen numerous variations on a similar theme. Our objective has been consistent throughout this effort. The primary desire of the ocean common carrier industry is to secure a more reliable and predictable regulatory scheme. We need a system which reflects modern industry economics and is hormonious with the laws of our trading partners. We need one adapted to the technological innovations brought about largely as a result of American-flag carriers. Containerization, intermodal service, and the various types of service and modern equipment we have pioneered have benefited our customers, and in fact the entire world.

Unfortunately, although American-flag carriers have been among the most innovative in the world, often they and their customers have been unable to fully reap the benefits of their progressive operations because of an antiquated regulatory system. Other major maritime nations either do not apply antitrust principles at all to shipping, or do not enforce their antitrust laws on their carriers in the same manner that this country does. This lack of uniformity in philosophy has disadvantaged our carriers and shippers.

This issue is so important to our operators that in March, 1980 the Presidents of the CASO member companies, after careful study, unanimously agreed that their highest legislative priority would be reform to the Shipping Act, 1916. They felt this legislation, more than any other, would help improve the competitive position of the American fleet. Just last week they reaffirmed this as their top legislative priority.

The proposed regulatory Bill is not a wholesale, sweeping change of our system as some opponents have claimed. Rather, it is primarily a procedural Bill designed to

allow carriers to operate in the manner originally intended by Congress. Numerous court decisions, primarily from the District of Columbia Circuit Court of Appeals, have undermined and limited the utility of the regulatory scheme by imposing extremely expensive and rigid hearing requirements that generally do little to illuminate the issues. Moreover, largely at the insistence of the Department of Justice, the development of conference intermodal service has been stifled. The FMC's attempts to resolve this dilemma administratively have been ineffective.

The Bill before the Committee, which represents a compromise with our costomers—the exporters and importers of America—is balanced so as to protect their interests. No shipper would have endorsed legislation which was seen as adversely affecting its transportation costs. On the other hand, the Bill will help carriers to plan with more certainty, and will help American carriers to equalize their position with foreign competition.

Simple allegations about this complex subject are easy to make but do not withstand scrutiny. Certainly many dire consequences have been predicted if this Bill is passed, yet virtually every study of the ocean common carrier industry undertaken in the past several years has concluded that the ability to rationalize service could result in significant savings for carriers and their customers. The liner industry is characterized by substantial new entry, very high capital costs, and low incremental costs. The ability to plan effectively, and to coordinate investment, will certainly improve efficiency of operation and result in benefits to carriers and shippers. Importers' and exporters' interests are accounted for in the provisions on independent action, and other features in the Bill which were included as part of the agreement negotiated between shippers and carriers last Session. The Bill is balanced to benefit carriers, shippers and our nation's trade. For these reasons we respectfully request that the Senate act with dispatch on this important legislation.

Senator GORTON. Mr. Klein.

Mr. KLEIN. Thank you, Mr. Chairman.

As you well know, Sea-Land has supported the bills that were introduced in the prior Congress. Sea-Land supports S. 47. The need for legislation is undiminished. That is demonstrated by this bipartisan support in the subcommittee.

I don't want to repeat much that has been said. I read Professor Garvey's prepared statement earlier, and I noted that he correctly described what he calls the unique and international nature of ocean shipping, and he said that need for change does exist.

I think S. 47 recognizes that, and in the exercise of congressional judgment of what is in the public interest, S. 47 provides specific guidance as to the conduct to be permitted and the conduct to be prohibited. It provides clarity and certainty, and therefore the reduction of procedural delay and governmental intrusion into the marketplace that Professor Garvey advocates in his prepared statement.

There has been talk, as has been mentioned, about price impact, and there have been predictions that the rates might go up as much as 20 percent. No studies have been presented that would show that the type of rationalization that the legislation would permit—not mandate but permit—would cause that kind of an increase.

There have in recent years, however, been studies that looked at the possibilities of rationalization. There was one done in 1976 which addressed the North Atlantic trades, and it was sponsored by Hapag-Lloyd. The study indicated that there could be a significant reduction in the number of vessels serving the North Atlantic.

They found in examining 1975 as the model year that utilization of space in the vessels in the trade was at a level of 68 percent. They projected that rationalization on a program reflected in the study would increase vessel utilization to 85 percent, reduce the

number of vessels but put more cargo into the vessels that were running.

They dropped no ports at all in that rationalization; they just brought the service into greater efficiency. They predicted that in one year there would be cost savings to the carriers of about $200 million, representing approximately 30 percent of the freight rates that were charged that year.

Now, they didn't say that they would pass 30 percent of savings on to the shippers. What they said was here was a 30 percent savings, which presents opportunity, one, for better profitability, two, some reflection in the prices charged shippers.

The Webb Institute did a study which projected that rationalization would produce savings of 50 percent in the cost of fuel. There is a study by Manalytics of the Atlantic trade conducted in 1980. They projected savings to the carriers of 25 to 28 percent. Again, the marketplace would determine how that affected the rates charged shippers.

The point is there would be opportunities for greater efficiency. It has been clearly demonstrated that there is no opportunity for true monopolization of ocean transportation under this bill. The conferences remain open. The trades remain open.

There is no barrier to entry and there will always be either the independent carrier outside the conference presenting pressure against unreasonable rate increases or the ability of people in the conference to insure conference responsiveness to shippers by taking independent action, or the increased abilities of shippers to articulate their needs to the carriers through shippers' councils, service contracts, and all the other devices that create the balancing in this bill and an even greater balance in the compromises that were developed in the course of the 97th Congress.

[The statement follows:]

STATEMENT OF PETER M. KLEIN ON BEHALF OF SEA-LAND INDUSTRIES INVESTMENTS, INC.

Mr. Chairman, I am Peter M. Klein, Vice President and General Counsel of Sea-land Service, Inc.—the only major unsubsidized U.S.-flag liner company and the pioneer of containerized intermodal transportation.

S. 47 presents us with something of a dilemma. It is perhaps an embarrassment of riches. With but one major exception it seems an ideal bill from a carrier's perspective. However, when we step back far enough to gain a broader perspective, it seems to be somewhat lacking in appropriate balance. We support the bill but ask that the necessary balance be added.

Sea-Land supported the predecessor bill S. 1593, before this Committee in the 97th Congress; but with specific recommended amendments. We also supported the companion House bill, H.R. 4374, with amendments.

The House passed H.R. 4374 in a version which was the result of a balancing of all interests, the compromise efforts of carriers and the shipping public and the cooperation of the House Merchant Marine and Fisheries and Judiciary Committees.

There followed a major effort to produce a further refinement of the balance of interrests by adjustment of the differences between the bill passed by the House and S. 1593 as reported out of this Committee. Unfortunately, no bill reached the floor of the Senate prior to adjournment of the 97th Congress.

Sea-Land supported the final negotiated draft bill which failed to reach the Senate floor during the lame duck session and is prepared to support it again at this time. It fairly balanced the many interests requiring consideration and protection.

Too many months of careful negotiations were spent reaching that balance for us to try to regain positions given up in the legislative process. The dangers of overreaching exist for both shippers and carriers and should be avoided.

The need for Shipping Act reform is undiminished. The problem of overtonnaging, the need for greater efficiency in serving the public through rationalization and intermodalism, the need for certainty as to the applicable law, and the need for speedy Federal Maritime Commission decisions on proposed carrier agreements all mandate rapid congressional action.

This Committee has heard extensive testimony in the past as to the problems and the need for legislation. I would like to speak now to the positive steps that S. 47 takes towards solving the problems and meeting the needs in a balanced fashion. (Although, as I said, more balance is needed.)

1. Carrier and conference actions would be subject to FMC and public scrutiny.

All intercarrier, conference, interconferece and other agreements under FMC jurisdiction would have to be filed wth the FMC, and notice of the agreement published in the Federal Register, prior to going into effect.

2. Agreement implementation may be blocked under statutory standards.

FMC may block implementation of an agreement within 45 days after filing if a complaint shows reasonable probabiity that the agreement violates the Act and that the complaint will be substantially injured absent suspension of the effectiveness of the agreement.

3. Challenges to agreements must be speedily determined.

Suspensions may not exceed 180 days and decisions must be rendered within 180 days of commencement of the FMC proceeding.

4. FMC must disapprove agreements not meeting statutory standards.

Agreements which on their face violate the Act or do not meet procedural standards must be rejected when filed.

Challenged agreements which violate the Act must be modifed or disapproved after hearing.

5. Penalties for violation of the Act are potentially 10 times greater than Sherman Act criminal fines and 1916 Act civil penalties combined.

There should not be any concern that anticompetitive acts in violation of the statute would not be deterred. The economic deterrent of this Bill is awesome.

Assume facts which clearly violate both the current Shipping Act, 1916 and the Sherman Act and assume that the same facts violate the new statute:

A and B are competitors in the liner trade. They serve the same multiple ports. They agree to an allocation of ports, to an allocaton of customers and to maintaining prices at artificially high levels.

A and B implement their agreement without filing it with the FMC and operate under the unfiled unapproved agreement for two years before it is discovered.

Under the 1916b Act each could be required to pay a civil penalty of up to $1,000 per day. Assuming a one count violation, each would face a civil penalty of $728,000.

Under a one count Sherman Act indictment each would face a maximum fine of $1,000,000.

Under S. 47 the penalty for an unaggravated violation of the statute would be up to $5,000 per day. In this hypothetical the violation would probably be found to have been wilful and knowing—bringing the maximum civil penalty to $25,000 per day for each carrier: a total of $18,200,000 each versus the $1,728,000 under the Sherman and 1916 Acts combined.

6. *No carrier would be forced to join a conference and conferences would remain "open".*

Nothing in S. 47 closes conferences or would make conference membership mandatory. Conferences, and the entire U.S. foreign trade, would remain open to all carriers ready and able to serve the public.

Carriers would remain free to exercise their independent business judgment as to whether to join a conference or to remain outside. A carrier could be a conference member in some trades and outside conferences in others. Conferences and outsiders would continue to compete with each other.

7. No "new weapons" against independents are given to conferences.

All of the authorized activities for conferences are activities which the present law would permit if the approval process were as efficient as S. 47 will make it.

8. Independent action is provided for but cannot be used in a predatory manner. It will not harm conferences.

There are conferences which have voluntarily established rights of independent action for their members. Independent action has served to ensure responsiveness of those conferences to shipper needs—both large and small shippers. It should be made mandatory.

Predatory use of independent action is not authorized and would be a violation of the statute.

9. Conferences would have the ability to set through intermodal rates while domestic inland carriers would continue to act independently.

Intermodalism is a transportation advance brought to maturity by containerization. A container the size of a tractor trailer body can be loaded with manufactured goods at a plant anywhere in the United States, move by truck or rail to any port on any coast and thence by ship to Europe, Asia, Africa, South America or Australia and by truck or rail to an inland destination. When emptied at the destination the container starts on another international trip.

The legislation would permit a shipper to enter into a single through intermodal contract of carriage rather than have to contract with a series of carriers for increments of transportation. Ocean common carrier conferences could agree on the through rate and terms, but the individual carrier members would have to make their own arrangements for services and rate divisions with the truck and rail carriers. Those inland carriers would not deal with the conferences and could not act through rate bureaus when dealing with the individual ocean common carrier.

10. Shippers are provided significant advantages.

The new loyalty contracts would offer shippers a choice between all water service and through intermodal service. They would also have ability to select competing ocean gateway ports and carriers outside the jurisdiction of the conference or ocean carrier with whom the loyalty contract had been made.

Shippers could enter into service contracts for defined levels of service in return for commitment of a specified minimum cargo volume.

Shippers would have the ability to form shippers' councils for purposes of consulting on ocean and intermodal common carriage issues.

This last point requires further discussion. S. 1593 authorized the establishment of shippers' councils in which shippers could confer and agree among themselves as to common positions to be taken in consultations with ocean common carriers or conferences on general rate levels, charges, classifications, rules, practices or services. Care was taken not to permit the shippers to confer as a collective on specific commodity rates or to collectively "negotiate", agree or contract with the carriers or conferences. The House followed the same approach in H.R. 4374 as passed.

S. 47 would depart from that approach by permitting a shippers' council to "consolidate cargo and negotiate time-volume and service contracts with ocean common carriers". Such a proposal was never made by any of the shippers or shipper groups that participated in the coalition that worked on last year's legislative effort. That coalition represented more than 1,800 shippers, large and small, in U.S. liner commerce.

S. 47's new shipper council authority to consolidate and negotiate is undesirable for several reasons and ought not be retained in the bill.

Importers of foreign goods would be able to band together to negotiate rate and service advantages from ocean carriers that would put domestic producers at even greater disadvantages than they now face in today's imbalanced trade environment.

The freight forwarder and nonvessel operating common carrier industries would be put out of business.

The members of the shippers' council would gain so great a knowledge of each other's consignees, suppliers, routings and shipments as to lead to a dimunition or elimination of competition among themselves in import or export trades.

The exchange of confidential information necessary in order for members of the council to be able to negotiate specific rates and terms with carriers, or a conference, would be disclosures that would alter competitive relationships among those shippers in their domestic markets and lead to actions which will conflict with domestic application of antitrust policy.

Shippers acting as a council might utilize the negotiating power to change rate structures in such a way as to shift a portion of their just share of the costs of the ocean transportation system to nonmembers or to other commodities which would then be forced out of international trade.

Sea-Land is not aware of any foreign nation in which the shipers' council now has the cargo consolidation power proposed in this bill.

In summary, we support the intent and purpose of S. 47 with the exception of the added power of shippers' councils to consolidate cargoes and negotiate rates. We also urge inclusion of the House-Senate compromise provisions that were found in the December 6, 1982 print of a proposed amendment in the nature of a substitute to H.R. 4374 as received from the House.

Mr. Chairman, I am grateful to you and this Committee for the opportunity to present the views of Sea-Land and will be pleased to attempt to answer any questions that the Committee may have.

Senator GORTON. Thank you. I thank all three of you for being here. We will have a few questions for you now. This is for all of you, but I think, Mr. Blank, at least it is primarily for you.

Opponents to S. 47 and to its predecessor argue that it amounts to a new and something of a wholesale attack on the philosophy of the antitrust laws of the United States. Can you tell me what activities of carriers would be authorized by S. 47 which are not authorized by present law?

Mr. KLEIN. I think I will try to answer that, sir.

Senator GORTON. Fine.

Mr. KLEIN. Really not very much. One thing that would be authorized is the ability to sit down with a group of shippers and discuss their needs. We are unable to do that today and the anomaly is that the present law says that a conference has to have a means of receiving shipper complaints and requests.

But because of the antitrust laws, as was testified to by the fruitgrowers, a conference can not sit down with a group of shippers. We have to deal one carrier with one shipper, or a representative of a conference with a single shipper. So there is a great deal of inefficiency. Under the new law, we would be able to get their group inputs. We would also have clarification of the conference intermodal authority, as the chairman of the FMC indicated. The FMC and the carriers believe that the authority is there today; the Justice Department thinks not. So that would be clarified.

I think it would also clarify that the dual rate contract system would apply to intermodal services, but everything that has been attacked as new and dangerous is really something which is authorized under section 15 where we do have the ability,—if we can get over the time delays, the burdens of proof, we do have the ability to rationalize. We do have the ability to pool, we do have the ability to eliminate service to ports, we do have the ability to cooperate in the use of facilities.

If we could get those things done before the commercial need has disappeared, there would be very little need to change the law. But as was pointed out earlier, it takes years to find out whether we can or cannot do something. And oftentimes, when we are told that we can do something and we implement an agreement, we find that after a period of time a court has said what you thought the FMC said you could do, you really could not do, and go back to square one—to what you did 5 years ago, thinking that it was not subject to the antitrust laws. Those are things that we need help with.

Senator GORTON. Mr. Klein, you are warmed up now. You can start with this one, and I would like to have each of the three of you tell us briefly what you would do to improve the specific provisions in S. 47.

Mr. SAYRE. I would appreciate the opportunity to do that. The consensus measure that was considered at the close of the last session from the shippers' point of view contains some procompetitive features which, while maybe outside the specifics that were originally addressed by the shipper-carrier compromise, did provide for very broad support.

Now, some of those features are technical in nature. Most were not highly controversial, and as I indicated, the NITL and the

CMA will soon supply your staff with a letter detailing those items that they feel should be restored to the legislation. Now, they will include, for example, a study commission on the regulation of ocean liner shipping. That is particularly appealing to those who regard the proposed reform legislation as an improvement, but who would like to see some other alternatives receive some deliberate examination.

I think that those organizations would like to see the legislative history recoup the shipper and carriers' understanding to provide for loyalty contracts that are negotiated to match shipper needs with carrier capability. They would like to see provisions for the monitoring and oversight of joint venture and pooling arrangements, as well as provisions for the prohibition of certain carrier activities. The burden of proof language on compliance with loyalty agreements they believe should be conformed to that originally voted out in S. 1593.

In a very short statement, I think those are some of the ways the measure it could be improved.

Senator GORTON. Thank you. Mr. Blank?

Mr. BLANK. Other than section 4(c)(4) which I previously referred to, the membership of CASO is highly delighted with S. 47 and does not necessarily desire any changes in it. On the other hand, I think I feel constrained to say that most of our members—there are some exceptions—have agreed to many of the changes that Mr. Sayre recommends. Not necessarily because we like them, but because this has been a compromise effort throughout, and we would stand by the House bill as it was agreed to in the preconference if that is the choice of the Senate.

Senator GORTON. Thank you. That is a very thoughtful answer. Mr. Klein?

Mr. KLEIN. Sea-Land's position is much the same. We like S. 47, with the exception of the one provision on powers of shippers' councils. Those compromises which were reached in the last Congress we felt were essential to passage at that time. If they continue to be essential to passage, we are prepared to accept them.

I think that the Presidential Study Committee is a good move to the extent that there are people who believe that there are stones unturned and there may be new nuggets of information not yet found or some solution not yet considered. I do not think either will be found, but I see no harm in the additional exercise so long as it does not delay this legislation.

Insofar as JV's are concerned, I would prefer not to see special rules before JV's could go into effect. I think that if there is to be an examination of the JV it ought to be after the fact, but I would accept either before or after examination as part of a package to get effective legislation.

One of the things we have to keep in mind if there are special rules for JV's, is that they may very well prevent the formation of a joint venture by carriers presently serving a trade, but there would be nothing to prevent some foreign lines not in a particular U.S. trade from forming a joint venture and then coming into the trade. And they would then have all of the economies of scale which the Americans might not be able to achieve because of prohibitions.

16-687 O—83——9

Mr. BLANK. If I could just address the question of joint ventures as well, because that has been one of our concerns. I think one of the most important features to emphasize in terms of any legislation with regard to joint ventures is that the regulatory obstacles to forming a joint venture are really not desired by any party.

What apparently was desired by the shippers on the House side was subsequent regulatory oversight to assure that there were no abuses. And I think that under those kinds of circumstances it was intended that litigation in delay would be minimized and that the joint venture could form. It would then be subject to some oversight. This situation becomes much, much more palatable to those operators in small trades where the joint ventures are really very necessary to make the American trades competitive with the foreign trades such as the small South American trades where in order to achieve economies of scale you have to form joint ventures.

Senator GORTON. Mr. Sayre, as you heard, one of the fundamental allegations in opposition to this bill is that while it may be good for large shippers like the company which you represent, it is certainly a net loss for small shippers.

Now, we, of course, have had some representatives from small shippers here today, but I wonder if you would like to respond to that charge.

Mr. SAYRE. Yes, I would. I think I would also point back to the testimony that you have already heard. I believe the measure will benefit all shippers, and I think that perhaps the opponents of the measure have overlooked really the procompetitive aspects contained in the provisions for independent action, time volume contracts and service contracts.

Those provisions are available to large and small shippers alike. And you heard this morning about mechanisms that can be employed in behalf of the small shipper to take advantage of those provisions.

I think the other thing is that we are going to create an environment which permits true and efficient intermodal systems which will permit all shippers, all American shippers, to be more competitive in international markets.

Now, you raised the question this morning of rates from other parts of the world, and I know I agree with Mr. Blank and Dr. Ferguson that one swallow does not make a summer. But just recently, our company started to source the Japanese market for one of our products from Holland, instead of the United States. And the reason for doing that is because the transportation costs from Holland to Japan are half what they are from the United States to Japan.

Senator GORTON. Is it a comparable distance?

Mr. SAYRE. Yes, it is. I think that the thing is many people, for example, I think you have probably heard in previous testimony, people who say they like the European system. I think what American shippers really like are the European rates. But one of the things that brought those rates about is the creation of a truly intermodal transportation system.

Senator GORTON. Does either Holland or Japan enforce domestic antitrust laws or any antitrust laws against shippers?

Mr. SAYRE. Not to my knowledge. There are discussions going on in Europe today about the application of the rules of competition, the EEC rules of competition, to ocean liner shipping that is not brought into force, and it is the source of vigorous debate within the European economic community.

Mr. BLANK. Even if they are, Senator, even if they are enacted, the current proposals that are being put forward by the Europeans are nothing close to what we have in the Shipping Act of 1916. They are somewhat closer to the provisions of this act. They have no prior approval requirement, and the most important provision of the proposed European rules, will be the rule preventing abuse of a dominant position. That is equivalent to what has been included up in the prohibited acts section of this bill.

Senator GORTON. Is it your testimony, then, that the passage of S. 47 will bring our laws related to international shipping closer to conformity to those of most of our major trading partners?

Mr. BLANK. I think there is no doubt about that. I think that it will facilitate our relations with our trading partners, and will, in fact, make them closer to both what our trading partners have now and what they are likely to enact.

Senator GORTON. Why is it your feeling that this will benefit the American merchant marine and the U.S.-flag merchant marine? Do you feel that it will benefit it just as it benefits all trade involving the United States or in some special fashion?

Mr. BLANK. No. I think it will have some special benefit for the American operators. The American operators, as I said, tend to be stable, with long-term investments in the trade. They tend to be the high quality operators of the trade. They offer the best service. They are the ones who offer the service that the shippers often go to when they feel they need help with the conferences.

They need certainty because they are not fast, in and out operators, as many other people can operate. They need long-term certainty, because they make long-term investments. They need some sense of a long-term ability to plan their investments with an adequate and fair return.

That is not the equivalent of extracting a monopoly rate. It is simply the ability to try to level out and keep rates somewhat stable, and to be able to plan and rationalize their service or tailor their service, tailor the high quality service to the expected demands of the trade. So I think there will be particular benefits for the Americans, although I do not think that that is at the cost of subsidizing foreigners at all. I just do not think there is any foreign subsidization here.

Senator GORTON. Senator Inouye?

Senator INOUYE. Thank you. Do you believe that the scope of activities prohibited by section 12 is broad enough to benefit or safeguard the public and the shipper, big and small, as well as independent vessel operators?

Mr. SAYRE. I think, as I said, the provisions that were incorporated in the preconferenced measure at the close of the last session are superior to those included in S. 47. Specifically, I would refer to the provision in that measure which prohibits carriers from allocating shippers among themselves. And there are some others similar to that.

Senator INOUYE. In reading the transcript up to this moment, one may get the impression that independent vessel operators are very small; that they do not mean much. What is the scope or the size of independent operators? What are we dealing with here?

Mr. KLEIN. Well, they vary in size from trade to trade. It might be a two- or three-vessel operator; it might be a very huge operator. In fact, it might be us, because we are in conferences in some trades, and outside conferences in others.

We are not exclusively one or the other in all trades. And by the way, that is something that could continue to be a possibility for any carrier. Under the proposed legislation, one would not have to be in a conference. But many of the independents are very large. They may often be among the largest carriers in the trade. They may also be present in significant numbers; for instance, in the trans-Pacific trades as a whole, there are 30-some-odd carriers, and I would say that almost a third are operating outside conferences. Some of them quite large.

Senator INOUYE. So we are not dealing with a small entity?

Mr. KLEIN. Not at all.

Mr. BLANK. Senator, I think it is also important to add that there are other competitive disciplines in the marketplace besides independents. There are tramp operators, and there is gateway competition, all of which has been utilized by shippers to assure that they are not forced to pay an unreasonable shipping rate. And they, in fact, do exist in the market. They are very lively competitive forces.

Senator INOUYE. So you do not believe that the American consumer will be jeopardized by the passage of this measure?

Mr. BLANK. I do not, and more importantly, the shippers do not. They are the ones that really can speak for themselves, and I think they have.

Senator INOUYE. Was the committee staff correct in concluding that the Department of Justice has never intervened when the parties seeking section 15 approval were all foreign-flag operators?

Mr. KLEIN. We were concerned about that point ourselves at Sea-Land because we have had that feeling over the years, and we did have our staff do a check of the FMC records. We were not able to find between—I think it is about 1975 or 1977 and early 1982 any instance where the Department of Justice protested an agreement in which all of the parties were foreigners.

On the other hand, we found five instances of Department of Justice intervention where Americans attempted to enter into agreements with foreigners.

Senator INOUYE. I thank you very much.

Senator GORTON. With that, I should like to thank this panel and all of the rest of the witnesses today, and the meeting is adjourned.

[Whereupon, at 12:20, the committee was recessed, subject to the call of the Chair.]

# ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

## STATEMENT OF THE NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS, INC.

### IDENTIFICATION OF NABI

The National Association of Beverage Importers, Inc., hereinafter NABI, is the national trade association for importers of wine, spirits and beer. Its membership of over 100 companies imports products from many countries throughout the world, but the heaviest volume of imports is from the European area. NABI members support U.S. flag carriers; and excluding carriage of goods through the Great Lakes, which is not served by U.S. carriers, approximately one-third of the tonnage of beverage alcohol imports is carried by U.S.-flag vessels.

NABI members, as well as other beverage alcohol importers, ship primarily with the carrier members of the North Atlantic Westbound Freight Association, the Continental North Atlantic Westbound Freight Association, WINAC, and the Iberian Conference. To give some index of the volume of imports involved, shipments of wines and spirits from the United Kingdom to the United States constitute the largest commodity class both in tonnage and in dollar volume.

### OVERVIEW

The Merchant Marine Subcommittee held brief hearings on S. 47 on February 2, 1983. This bill is a further refinement of S. 1593 which was subject to hearings and study during the 97th Congress. It is the clear intent of the Senate Merchant Marine Subcommittee to move the new bill forward to mark-up and Senate floor action at the earliest opportunity.

### NABI POSITION

The NABI position on S. 1593 is set forth in the record of Hearings, Serial 97-72 at page 409, et seq. The NABI position has not essentially changed since this statement was filed. However, the present S. 47 has been modified from the original version of S. 1593. With the fast-track schedule of the Senate Merchant Marine Subcommittee for early mark-up of this bill, NABI at this time limits its comments to the matter of support for shippers' councils.

### SHIPPERS' COUNCILS

NABI supports the provisions which would permit shippers' councils. This is the most important benefit to be derived from the proposed legislation as far as smaller shippers are concerned.

Sec. 4(c) authorizes shippers' councils which may:

"(1) mutually consult and exchange information or views regarding rates charges, classifications, rules, practices, or services;

"(2) agree upon common positions;

"(3) consult and confer with any ocean common carrier or conference regarding general rate levels, charges, classifications, rules, practices, or services; and

"(4) consolidate cargo and negotiate time-volume and service contracts with ocean common carriers."

In Sec. 4(c)(3) above, the word "general" in line 14 on page 11 of the bill should be deleted. This would give shippers the authority to discuss with conferences and/or carriers specific rates for specific commodities.

To the same extent, Sec. 4(c)(4) should be expanded to include shipper authority to deal with specific freight rates. Additionally, the authority to "negotiate" should be extended to negotiation with conferences, in addition to negotiation with common carriers.

To this end, Sec. 4(c)(4) should be rewritten as follows:

"(4) consolidate cargo, negotiate rates, charges, classifications, rates, practices, or services with any ocean common carrier or conference and negotiate time-volume and service contracts with any ocean common carrier or conference."

The foregoing goes beyond the original recommendations on shippers' councils which appear in Senate Report 97-414 at page 29:

"Section (c) provides, for the first time, antitrust immunity to shippers, acting through shippers' councils, to confer and agree among themselves and to consult and confer with ocean common carriers or conferences on the broad range of general rate levels, charges, classifications, rules, practices, or services, offered. They may not, however, confer upon specific commodity rates; nor may they negotiate, agree, or contract with ocean common carriers or conferences."

The foregoing has been somewhat abrogated by Sec. 4(c)(4) which would authorize "negotiations."

NABI urges expanded authority for shippers' councils under Sec. 4(c)(4) with the suggested above revisions. Shippers' councils should be authorized to negotiate time-volume and service contracts, and also to negotiate additional basic aspects of rate structure. This authority is necessary in order to place small shippers on an equal footing with large shippers.

On a minor point of bill structure, it should be pointed out that a "service contract" is defined at Sec. 3(21), but there is no definition of "time-volume" contract in this section. "Time-volume rates" are defined under Sec. 8 concerning tariffs at subsection (b). A definition of a time-volume contract should be inserted at Sec. 3(27), with present (27) renumbered as (28).

### THE PROBLEM OF SMALLER SHIPPERS UNDER VOLUME CONTRACTS

Time-volume and service contracts favor the large shippers. It is one thing to authorize shippers' councils to negotiate these contracts. it is quite another to make them commercially available, or commercially feasible. For example:

#### A. THE LARGE SHIPPER

A large U.S. manufacturer might come to the shipping lines with an offer to negotiate a contract covering an annual volume of 100,000 tons of cargo. It would be a simple task for such a shipper to negotiate perferential rates with a carrier or conference. The negotiations could produce a service contract, a time-volume contract, or a combination of both. The preferential result for the shipper might also be accomplished under the simple mechanism of a loyalty contract through a rate available to all users specifying a discount for shipments of 20 or 30 containers at one time on one bill of lading.

#### B. THE SMALL SHIPPER

(1) *Small shipper operating alone.*—A small shipper with an annual volume of less than 5,000 tons of cargo probably cannot obtain a preferential rate. This is simply because he does not stand out from the rest of the shippers.

Under present tariff filing requirements, and the provisions of S. 47, which appear at Sec. 9(c), the discount rates on time volume rates "shall be available to all shippers similarly situated" (p. 25 line 22 & 23 of the bill). In practical effect this means that if a shipper controls large tonnage he gets a preferential rate. If his tonnage is relatively small he will not. The rates are controlled not by the mechanics of the law, but by the mechanics of the marketplace. All the law can do is forbid discrimination between shippers of goods in equal quantities.

(2) *Small shippers acting together.*—Sec. 4(c) as presently drafted would allow small shippers to negotiate time-volume and service contracts. This would necessitate the pooling of cargo among competitors, in order to aggregate an amount of cargo which would be subject to a volume rate.

Legislating permissible cooperation does not mandate such cooperation. For reasons of either competitive jealousy or competitive independence there is doubt that avid competitors would pool a major portion of their cargo in order to obtain service contracts or time-volume contracts. Some of the disadvantages of pooling cargo are:

(1) It could subject competitors to antitrust scrutiny,

(2) It could release confidential import or export statistics,

(3) It could be unfeasible through lack of common origin or terminus for goods, and

(4) It could delay cargo.

The foregoing is not an objection to the more liberal rules for shippers' councils. It is to underscore the fact that no legislation can make large shippers equal to small shippers.

It is precisely for this reason that shippers' councils should have authority to negotiate general freight rates for specific commodity groups. For many years, importers of beverage alcohol products have been dissatisfied with the unilaterally dictated freight rates. These present freight rates for the carriage of wine and spirits from the United Kingdom to North and South Atlantic ports contain a large subsidy for other lower valued items. A shippers' council should allow these rates to be discussed individually. This position was set forth to this Senate Subcommittee in the NABI statement of September, 1981:

"There is a current and urgent necessity for beverage alcohol importers to be authorized to negotiate with the carriers on a commodity basis, through the authorization of Shippers' Councils, which would grant shippers and importers an antitrust exemption for such negotiations. Beverage alcohol products, and most particularly wine and spirits, are high value commodities, and the carriers, rightly or wrongly, have been charging a high rate for the carriage of these goods, based upon their value. The profitability on this heavily tonnaged commodity provides revenues to the carriers so that lower rates may be charged for other lower valued commodities. It is only fair that the importers of beverage alcohol products be allowed to meet with the carriers and carry on bona fide negotiations, dealing with their own particular freight rates, rather than with freight rates in general. Under the circumstances, a "broadly based" Shipper's Council which covers a broad range of commodities would be of no use to the importers of beverage alcohol products, since importers' interests in the specific freight rates would be lost in the discussions on overall rate structure . . .

"The Chairman of the Federal Maritime Commission, on page 9 of a September 21, 1981 Communication to the Committee, expresses this view in a short statement: 'Subsection (1) implies that shippers' councils must be established by commodity groups'."

CONCLUSION

NABI recommends that the foregoing changes in the language of the shippers' councils provisions be adopted. Additionally, the Committee report on S. 47 should contain language explaining the fact that shippers' councils shall have authority to deal with specific tariff rates covering individual commodities.

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JOINT MARITIME CONGRESS,
*Washington, D.C., February 2, 1983.*

Hon. BOB PACKWOOD,
*145 Russell Senate Office Building,*
*Washington, D.C.*

DEAR SENATOR PACKWOOOD: The Joint Maritime Congress would like to take this opportunity to comment on the Ocean Shipping Act of 1983, S. 47. You and the rest of the Subcommittee are to be commended for your renewed efforts to produce and see through the Senate a bill which promotes a strong U.S.-flag merchant marine and at the same time furthers the interests of American shippers and consumers.

As you may know, the Joint Maritime Congress represents over 100 U.S.-flag carriers. Those operating in the liner trades are vitally concerned about the present stifling regulatory system and support the general thrust of S. 47. The Joint Maritime Congress testified before the Subcommittee during the 97th Congress that S. 1593 would provide a regulatory framework which encourages efficiency, streamlines the government's regulatory procedures and offers needed protections for consumers and exporters and importers of goods. S. 47 would accomplish the same goals.

We believe that your efforts will ultimately lead to needed changes in our present regulatory system which is the worst of all possible regulatory frameworks—resulting in low load factors, low profits, and rising freight rates. The cost of the resulting inefficiencies has been enormous. The U.S. maritime industry is not looking for a handout, but only seeks the ability to complete effectively in the international ocean carrier marketplace of today. This bill will go a long way toward accomplishing this goal.

If the Joint Maritime Congress may be of assistance to the Subcommittee as work on regulatory reform continues, please do not hesitate to contact us.

Sincerely,

DAVID A. LEFF,
*Executive Director.*

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NATIONAL MARINE ENGINEERS'
BENEFICIAL ASSOCIATION,
*Washington, D.C., February 2, 1983.*

Hon. BOB PACKWOOD,
*145 Russell Senate Office Building,*
*Washington, D.C.*

DEAR SENATOR PACKWOOD: I am writing to commend the Merchant Marine Subcommittee on itrs expeditious consideration of S. 47, a bill to improve the international ocean commerce transportation system of the United States. Last year's near miss in enacting S. 1593 was a setback in revitalizing the U.S.-flag fleet. Your diligence, however, makes me confident that the enactment of meaningful maritime regulatory reform can be realized this year.

I remain convinced that the present regulatory system is neither efficient nor effective in today's international commercial environment. The enactment of S. 47 would be a major step toward a sensible regulatory policy; one which promotes a stronger and more efficient U.S. merchant marine as well as benefiting all facets of the industry and the U.S. economy as a whole.

Today's Subcommittee hearing underscored that the proposed changes will not, as some critics charge, result in higher prices to consumers. Ocean shipping will continue to be the cheapest method of transportation. I believe that S. 47, like S. 1593, offers adequate protection to exporters and importers as well as consumers. This belief must be widespread given the overwhelming support this measure is receiving from a variety of competing interests.

It is time, as your actions have demonstrated, to clasify and modernize the regulatory system in which the shipping industry must operate. The National Marine Engineers' Beneficial Association stands ready to provide the Subcommittee any assistance necessary to insure its speedy passage.

Sincerely,

*Jesse M. Calhoon, President.*

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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,
*Washington, D.C., February 3, 1983.*

Hon. TED STEVENS,
*Chairman, Subcommittee on Merchant Marine and Tourism, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.*

DEAR CHAIRMAN STEVENS: The National Industrial Transportation League would like to take this opportunity to express its views on S. 47, Shipping Act of 1983. The League concurs in the testimony offered by Clifford M. Sayre of E. I. duPont deNemours, who appeared as a witness during your subcommittee's February 2 hearing on this measure.

Mr. Sayre played an active role in helping to achieve the shipper/carrier consensus on maritime regulatory reform legislation, which was adopted by your subcommittee in S. 1593, Shipping Act of 1982. The League was a party to those consensus efforts, and continues its support of maritime regulatory reform legislation which balances the needs of shippers, carriers, and the public interest so that our maritime liner fleet can more effectively participate in ocean transportation and U.S. producers can more effectively market their goods in foreign commerce.

We fully support the additional changes outlined by Mr. Sayre in his remarks on how to further improve S. 47 so that it meets our mutual goals. To summarize, these changes include:

Clearly establishing that shippers and carriers are equal partners in negotiating the scope of any loyalty contracts so that these contractual arrangements are tailored to meet the commercial needs of both parties. This reform was an essential part of the shipper/carrier consensus, and was included in the legislative history of S. 1593.

Prohibiting any conference or group of carriers from allocating shippers among specific carrier members, except as required by law or as agreed to in a service con-

tract, or from preventing any of its carrier members from soliciting cargo from a particular shipper.

Reinstating the burden of proof standards for loyalty contract violations that were originally approved by the Senate Commerce Committee in S. 1593. These standards are an important feature of the shipper/carrier consensus.

Ensuring better monitoring and oversight of joint ventures and pooling arrangements to assure that they remain dedicated to their original purpose of promoting efficiencies that will ultimately be passed along to purchasers of these services.

Extending antitrust immunity only to those activities which are pursuant to agreements approved by the Federal Maritime Commission on which the carriers reasonably believe are pursuant to these agreements.

Providing the FMC with clear guidance that any actions taken on a proposed agreement adequately safeguard the rights of shippers and consumers.

Creating a study commission to determine what further regulatory reforms may be needed to improve the financial plight of the liner fleet and U.S. participation in world commerce.

Another issue the League would bring to your attention is the mandatory right of independent action within a conference. This issue is of great concern to shippers, and was one of the hardest issues on which to reach consensus with the carriers. While we continue to support the consensus, we fully realize some potential problems.

Shippers would urge careful Congressional oversight of this reform, because they are concerned about conferences abandoning loyalty contracts, especially in those trades where there is insufficient competition from independent carriers. If shippers' concerns are realized, the League would urge that the committee consider extending the mandatory right of independent action to all conferences whether or not there are loyalty contracts so that the measure's balance between the needs of shippers and carriers is maintained.

The League looks forward to working with you and your staff to ensure enactment of maritime reform legislation which contains the necessary system of balances ensuring a more competitive U.S.-flag liner fleet and an increased U.S. role in foreign commerce. We hope that our comments would be made part of the hearing record on S. 47.

Sincerely,

JAMES E. BARTLEY,
*Executive Vice President.*

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CHEMICAL MANUFACTURERS ASSOCIATION,
*Washington, D.C., February 10, 1983.*

Hon. TED STEVENS,
*Chairman, Committee on Commerce, Science, and Transportation, Subcommittee on Merchant Marine, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The purpose of this letter is to request that comments of the Chemical Manufacturers Association (CMA) be included in the February 2, 1983, hearing record on S. 47, The Shipping Act of 1983. The attached comments include certain proposed changes to S. 47, which the chemical industry believes are necessary to accomplish the dual goals of enhancing the U.S. merchant fleet and the ability of U.S. exporters to compete in world markets.

In addition to certain technical changes and minimal revisions that would incorporate prior legislative history, the proposed substantive changes reflect the language in the House-passed version of the last session (H.R. 4374). The only proposed changes that differ from that bill are:

1. Clarification occur that port-to-port loyalty contract service is dissimilar from intermodal loyalty contract service (see Item 1(a)).

2. A mandatory right of independent action (see Item 2).

3. That the carrier have the burden of proving that the shipper has not divested control of its cargo to avoid its loyalty obligation (see Item 6).

4. That there be a statute of limitations for enforcing an order of a four-year period violation or a one-year period from discovery of violation (see Item 7(d)).

Thank you for considering our views on this critical legislation. We urge passage of S. 47 with the proposed changes. Please do not hesitate to call us if we can pro-

vide any additional information. Our Legislative Representative is W. Alan Woodford (887-1136) and our Transportation Counsel is Kenneth M. Kastner (887-1160).

Sincerely,

WILLIAM M. STOVER,
*Vice President and Director of Government Relations.*

Enclosure.

COMMENTS OF THE CHEMICAL MANUFACTURERS ASSOCIATION

The Chemical Manufacturers Association (CMA) is a nonprofit trade association whose memer companies represent more than 90 percent of the productive capacity of basic industrial chemicals. Total shipments of chemicals and allied products were valued at $184.8 billion in 1981. Exports totaled $20.74 billion, representing a 1981 contribution of $11.4 billion toward a positive trade balance. Competition in world markets is severe and exports are decreasing while imports are increasing. This favorable balance of trade is expected to drop 31 percent by the end of 1983.

Like the other recent Shipping Act reform bills, S. 47 broadly exempts almost all carriers activity from the antitrust laws, regardless of whether the activity prevents competition. Anticompetitive activity also will not be a Shipping Act violation unless it is one of the six fairly narrow prohibited acts of Section 12(c). Finally, the ability to challenge activity that may violate the proposed Acts is substantially limited by provisions that shift the burden of proof, exclude injunctive relief, limit suspension, etc.

These changes to existing law, in the absence of countervailing provisions in the Act, would enable conferences to significantly raise ocean freight rates and restrict service. In the short run, this might benefit the few U.S. carriers and the many foreign carriers that are conference members. However, the ability of U.S. exporters to compete in world markets would substantially decrease, resulting in fewer manufacturing jobs in U.S. plants and a decrease in the U.S. balance of trade. Also, we submit, the substantial decrease in U.S. exports would ultimately hurt the U.S. carrier fleet.

Consequently, there must be a delicate balance between provisions that enhance the cartel power of conferences and provisions that insure competition in ocean transportation. CMA applauds the Committee for strenthening the shippers' councils provision, since this is one of the countervailing forces that may encourage rationalization of traffic by the use of time/volume and service contracts. We urge the Committee to continue to support the shippers' councils language in S. 47, as it is imperative that U.S. shippers' councils be given freedom to rationalize that, at least, approaches the complete freedom that foreign shippers' council will enjoy under S. 47.

Additionally, however, the chemical industry believes that the following proposed changes to S. 47 also are essential to insure a proper balance. Several of these changes are merely technical in nature or call for reincorporation of the legislative history that died with the expiration of the 97th Congress. The changes that are substantive in nature suggest a return to language that was in the lame duck version of H.R. 4374, as this language generally approaches a reasonable compromise of shipper and carrier interests. The only proposed substantive changes that differ from the lame duck language are:

Item 1(a); Intermodal and Port-to-Port Loyalty Contracts.
Item 2: Mandatory Right of Independent Action.
Item 6: Burden of Proving Compliance with Loyalty Contract.
Item 7(d): Statute of Limitations for Enforcing an Order.

A. PROPOSED SUBSTANTIVE CHANGES TO S. 47

*1. Loyalty contracts*

*(a) Intermodal and port-to-port loyalty contracts*

It is essential to the efficient transportation of U.S. exports and imports that shippers and carriers be able to freely enter into through intermodal service arrangements. Consequently, CMA supports the provisions in S. 47 that promote the effective development of through intermodal service. CMA agrees that common carriers, individually or as a conference, should have the right to offer through intermodal service including intermodal loyalty contracts. The clarifying provision noted below, however, should be added to § 7(a)(1) of S. 47 to insure that intermodalism is not stymied.

A problem may arise under § 7(a)(1) as presently worded, for example, if a shipper in Pittsburgh uses its option under § 7(a)(1) and executes only a port-to-port contract with the North Atlantic East Bound conference. The shipper should be able to arrange for a non-conference intermodal movement from Pittsburgh to La Harve since it has only bound itself to the dissimilar port-to-port service of the conference. S. 47, however, does not make this clear. Without clarification of this point, the conference might argue that any movement through a North Atlantic port to La Harve, whether through intermodal or port-to-port, must be on conference carriers.

This potential power of a conference to prohibit non-conference dissimilar service is particularly unreasonable when one recognizes that many conferences, or many of the carriers within a conference, may not be able to provide adequate intermodal service. To implement through intermodal service from a large number of inland points in the U.S., to a large number of points in a foreign country, the common carrier or conference must be in position to spot containers at each inland point, negotiate separately with inland carriers in the U.S. for transportation of the empty container to the shipper and the filled container from the shipper to the carrier's vessel, and to negotiate similar services on the inland movement in the foreign country. It will be difficult for many individual conference carriers to negotiate the inland rates and to provide containers at a wide variety of points. It is unlikely that all carriers in a conference, or indeed a majority of the carriers, could provide rates and service from all points in the origin range to all points in the destination range. Given the fact that many conferences require unanimous approval of all rates, and the majority require approval of 75% of more of the carriers, it is likely that one or more conference carriers not able to provide service between any two inland city points would be best served by refusing to approve rates between the city pairs they cannot serve. Carriers with limited containers capability would be best served by resisting publication of through container rates. Since U.S. flag carriers have been leaders in innovation in container, RoRo and LASH service, foreign dominated conferences should not have the power to use a loyalty contract to restrict the development of intermodal service that relies heavily on these innovative means of transportation.

Thus, the following sentence should be added to § 7(a)(1) of S. 47. It should be noted that this sentence in no way limits the right of conferences to offer intermodal loyalty contracts, the ability of conferences to offer intermodal service, or the option of the shipper to choose only port-to-port contract service or only intermodal contract service where both are offered by the conference. The additional provision merely clarifies the right of the shipper to use a dissimilar service than that which it is bound to use under its loyalty obligation.

"(1). . . Further, where, over the same range of ports, the shipper has executed only a port-to-port loyalty contract or only an intermodal loyalty contract, use of non-conference intermodal service will not violate the port-to-port contract, and use of non-conference port-to-port service will not violate the intermodal contract."

*(b) Tailoring Loyalty contracts*

Like S. 1593 in the 97th Congress, Section 3 (14) of S. 47 provides that a loyalty contract can cover "all or a fixed portion of [the shipper's] cargo." Section 7 (a)(7) provides that the shipper may "terminate the contract rate system in whole or with respect to any commodity without penalty." The Senate Report on S. 1593 elaborated upon this notion by stating that a loyalty contract may be tailored to apply to specific commodities and to specific geographic areas. S. Rep. No. 97-414, p. 33. Consistent with this tailoring concept in § 3 (14), the shipper should also be expressly permitted to tailor a loyalty contract to a specific shipment size, such as to only full container loads, etc. Thus, in order to facilitate shipper/carrier arrangements that meet varying commercial needs, a new § 7 (a) (10) should be added to S. 47 to provide:

[any carrier or conference may utilize a loyalty contract]

"(10) if the contract shipper is permitted to tailor the contract to a specific commodity or commodities, to a specific geographic area or areas, and to a specific shipment size or sizes."

(C) *LASH, RoRo Etc.*—Like S. 1593, Section 7 (a)(2) of S. 47 waives the shipper's loyalty obligation when the carrier cannot provide "space as requested." The Senate Report on S. 1593 clarified this provision by noting that if the conference did not have available a particular type of space (e.g. LASH, RoRo, break-bulk, container) the shipper would be relieved of its loyalty obligation. The Senate Report stated:

"Section 7(a) (2) waives the shippers' loyalty obligation when the carrier cannot provide sufficient space of the type that is suited to the shippers purposes; it is in-

tended to recognize, for example, the difference between LASH, break-bulk, and container space."

S. Rep. 97-414, p. 33. Similar language should be included in the Committee Report on S. 47.

*2. Mandatory right of independent action*

Under § 5 (d), carriers within a conference are assured the right to take independent action only if the conference has in effect a loyalty contract. Conferences can, and we understand some will, avoid the independent action requirement by simply doing away with the loyalty contract. Independent action, however, is the most important competitive force within a conference against the setting of monopolistic rates and service partices. This competitive force is particularly critical in light of the increased pressure for cargo preference, bilateral, and multilateral UNCTAD arrangements, in light of the recent attrition and proposed acquisitions of U.S. flag carriers, and in light of the decreased competition that will result from the pooling and joint venture provisions of S. 47. Consequently, there should be a reconsideration of the proper scope of the mandatory right of independent action. If the right is contingent on a loyalty contract, U.S. flag carriers may be unduly restricted by the foreign dominated conference from offering competitive rates and service, and U.S. exporters may lose this important countervailing force to the cartel power of the conference. Thus, a new § 5 (c)(7) should be added to S. 47 as follows:

[Each conference agreement must * * *]

"(7) permit any member to take independent action on any rate or service item required to be filed in a tariff under Section 9."

*3. Antitrust immunity if there is a reasonable belief*

Section 8 (a)(1) of S. 47 provides that any agreement or activity described in Section 4, whether or not approved by the Commission, is immune from the antitrust laws. This provision should be changed to require that the agreement or activity should be approved or should reasonably be believed to have been approved. Otherwise, antitrust immunity will be conferred upon secret agreements that have not been properly submitted to the regulatory process. Specifically, § 8 (a)(1) should be changed as follows:

"(a) The antitrust laws do not apply to—

"(1) any agreement that has been filed under section 5 and has become effective under section 6, or is exempt under section 18 from any requirement of this Act;

"(2) any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into in the reasonable belief that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under the activity took place, or (B) it is exempt under section 18 from any filing requirement of this Act."

*4. Allocation of shippers*

A conference should be prohibited from allocating a shipper to a specific carrier, and from restricting a carrier from soliciting cargo from a shipper. These prohibited acts insure that the shipper will be able to use the service alternatives of all conference carriers which is important not only from an economic standpoint, but also, with regard to chemicals, from a safety standpoint. Moreover, a restriction on cargo solicitation might inhibit the ability of a conference carrier to take independent action. Therefore, a new Section 12(c)(7) should be added that would not allow a conference to:

"(7) allocate shippers among specific carriers that are parties to an agreement or prohibit any carrier that is a party to the agreement from soliciting cargo from any particular shipper, except as otherwise required by the law of the United States or the importing or exporting country, or as agreed to by a shipper in a service contract."

*5. Pooling of net losses and profits, joint ventures*

*(a) Net profit and loss pools*

Carriers should be prohibited from pooling net losses and profits. Such would encourage the inefficient carrier to remain inefficient. Moreover, if losses and profits are pooled, ocean services from a conference would in essence be provided by a single commercial entity. It should be noted that the proposed wording would not limit the ability of carriers to reduce overcapacity since pooling of traffic and revenues will continue to be permitted. Therefore, a new Section 12(c)(8) should be added that would not permit a carrier to

"form or participate in a net profit or loss pool with other common carriers operating in the same trade."

*(b) Joint ventures*

S. 47 contains no restrictions on joint ventures. While a joint venture may be necessary to efficiently meet a particular demand for ocean transportation, the unrestricted use of joint ventures could substantially reduce the competitive alternatives in a trade.

Carriers that enter joint ventures should be required to demonstrate that the decreased competition is justified by enhanced efficiency. Thus, a new subsection should be added to Section 12 that would provide:

"(1) Subject to paragraph (2), no common carrier, directly or indirectly, may form a joint venture with other common carriers operating in the same trade to engage in conduct that substantially reduces competition in the trade considered as a whole, unless the joint venture—

(A) results in gains in efficiency or services that outweigh any substantial reduction in competition;

(B) authorized by an express provision of a government-to-government agreement; or

(C) is in furtherance of foreign policy interests of the United States which outweigh the interests of the United States in preventing the substantial reduction in competition."

*(c) Pooling investigations*

Because pooling, joint venture and consortium agreements inherently reduce competition, the Commission should have special powers to conduct an investigation of such an agreement. The investigation would determine whether the gains in efficiency and quality of service outweigh the reduced competition of a pooling, joint venture, or consortium arrangement. If the gains do not outweigh the reduced competition, the Commission could modify or cancel the arrangement. Thus, a new section should be added as follows:

"Special Investigations of Conduct Pursuant to Pooling Agreements

(1) The Commission, upon its own motion or at the request of the Attorney General or the Federal Trade Commission, may initiate an investigation of conduct pursuant to an agreement to pool or apportion traffic or revenues, or charter space, with other common carriers operating in the same trade if it believes that conduct pursuant to the agreement substantially reduces competition in the trade.

(2) The Commission shall cancel or modify any agreement subject to investigation pursuant to paragraph (1) if it determines that conduct pursuant to the agreement substantially reduces competition in the trade unless the agreement—

(A) results in gains in efficiency or services that outweigh any substantial reduction in competition:

(B) is authorized by an express provision of a government-to-government agreement or undertaken pursuant to a government-to-government agreement in effect as of the date of enactment of this act, or an extension thereof; or

(C) is in furtherance of foreign policy interests of the United States that outweigh the interests of the United States in preventing the substantial reduction in competition.

(3) The sole remedy under this Act for conduct found to violate paragraph (2) is cancellation or modification of the agreement.

*(d) Definitions of "net profit and loss pools" and of "joint venture"*

Definitions of a "net profit and loss pool" and of a "joint venture" should be included in S. 47 if, as CMA suggests, there will be regulation of these activities. These terms should be defined as follows:

'Joint venture' means a consortium, joint service agreement, or other agreement that will result in the establishment of a new and distinct ocean carrier, or service to be operated for the benefit of the agreeing ocean common carriers and will result in elimination of, or absence of, all competition in the affected trade among the parties to the agreement; and

'net profit or loss pool' means a pooling or apportionment of net profits or net losses, or any similar arrangement that results in the participants sharing all or virtually al of their costs of operation; but the term does not include a pooling or apportionment of revenues in which, each participant continues to bear a substantial portion of his own costs even if such pooling provides for certain adjustments to revenue or expense or results in the sharing of certain costs."

*6. Burden of proving compliance with loyalty contract*

The burden of proof that a shipper has divested itself of control of a shipment to avoid its loyalty obligation should not be on the shipper. As under current law, the conference should be required to prove a breach of the loyalty obligation. A major purpose of S. 47, like other recent Shipping Act reform bills, is to shift the burden of proof so that the carriers to an agreement are no longer required to prove a negative (i.e. the agreement does not violate Section 15 the Shipping Act, 1916). similarly, shippers should not be required to prove a negaive (i.e. that its actions do not violate its loyalty agreement). Thus lines 20–23 of Section 7(a)(4) should be changed to read:

"* * * In any dispute under this paragraph, the *conference or conference carrier* has the burden of showing by a preponderance of the evidence that *the shipper* is in breach of the contract."

A better altenative is to simply delete this sentence. Deletion would avoid raising a negative pregnant that this is the only breach of a loyalty obligation that the carrier has the burden of proving.

*7. Strengthened remedies*

The extension of antitrust immunity under S. 47 requires a strengthening of the remedies for Shipping Act violations. Specifically:

*(a) Reparations*

Reparations should include the actual amount of the injury and interest from the date of the injury. The Commission also should have discretion to impose up to two times the sum of the actual injury and interest for egregious violations of the Act. Thus, Section 13(f) of the pre-conference, lame duck version of H.R. 4374 should replace § 13(f) of S. 47. CMA, however, agrees to a two year statute of limitations for instituting a reparation action.

*(b) Injunctive relief*

The Commission and private parties should not be denied the remedy of injunctive relief against carrier practices that appear to be clearly in violation of the proposed Act. Thus, Section 13(g) of the pre-conference, lame duck version of H.R. 4373 should be added to § 13 of S. 47.

*(c) Suspension standards*

Agreements seldom provide enough information by which a complaining party can show a probable violation and probable substantial injury as required for suspension of an agreement under § 6(b) of S. 47. There should be a mechanism whereby additional information can be sought from the filing parties so that issues of legality can be resolved. Therefore, § 6(b) of S. 47 should be replaced with the following provisions:

> "REVIEW.—At any time before the expiration of the forty-five day period referred to in subsection (a), the Commission, upon its own motion or motion of a complaining party, may request from the person filing the agreement any additional information that it deems necessary to determine whether the agreement is in violation of this Act. If, after preliminary investigation, the Commission believes there is a substantial probability that the agreement will operate in violation of this Act, the Commission may suspend the effective date of the Agreement for a period not to exceed ninety days after the additional information is received, or ninety days after the period specified in subsection (a), whichever is later. The Commission shall by order disapprove any agreement that it finds will operate in violation of this Act."

*(d) Statute of limitations for enforcing an order*

Section 16(e) of S. 47 provides for a one year from violation statute of limitations for bringing an action to enforce a Commission order. Often a violation of a Commission order cannot reasonably be discovered within one year. The statute of limitations should be four years from the violation, or one year from the time the violation is known or should have reasonably been known.

*8. Study Commission on International Ocean shipping*

S. 47, like other recent Shipping Act reform bills, proposes to improve the U.S. maritime regulatory environment by offsetting the increased antitrust immunity and limited prohibited acts with countervailing forces such as shippers councils, degrees of independent action, etc. Which CMA is optimistic that this proposed regime will satisfy the needs of carriers and exporters, such cannot be conclusively determined until the regime has taken effect. Moreover, the success of the proposed

regime may be influenced by the increasing world pressure to bow to cargo preference arrangements. Finally, other alternatives, such as deregulation in varying forms, or various promotional efforts, may be a better solution to the problems in the U.S. maritime community.

Accordingly, CMA believes that a Study Commission should be established to review the success of the proposed regime, and to assess the need for changes to that regime if world circumstances change or if other approaches to maritime regulation seem appropriate. Thus, § 20 of the pre-conference, lame duck version of H.R. 4374 should be added to S. 47.

B. PROPOSED TECHNICAL CHANGES TO S. 47

*1. No antitrust immunity for bulk parcel tankers*

Because there are only four major bulk parcel tanker companies serving the U.S. trades, the Commission consistently has refused to find that their joint activity would be in the public interest, and therefore they have never operated with antitrust immunity. Like other Shipping Act reform bills introduced in the 97th Congress, S. 47 would automatically confer antitrust immunity on parcel tankers because they will generally meet the definition of "ocean common carriers," and the "public interest" test is eliminated. Clarification of this situation was entered into the Congressional Record of the 97th Congress at H. 6902 as follows:

"It is important that my colleagus know, and that the record clearly demonstrates that the regulatory procedures contained within H.R. 4374 apply only to those carriers who operate as liners, that is, carriers of general cargo over regular routes, whose service is freely available to all shippers without discrimintion. At no time was this legislation ever intended to permit the formation of conferences or to extend this regulatory scheme to tanker or bulk cargo operators, even if those tanker operators carry chemical parcels in less than full shipload lots."

This Congressional Record statement, however, may not be entirely correct since parcel tankers that operate as common carriers are subject to FMC jurisdiction under the present Act and under S. 47. The point that needs to be made is that parcel tankers have never been permitted to engage in cartel activity, nor will they be given this opportunity under S. 47. This clarification should be accomplished by adding the following as § 8(b)(3):

> [antitrust immunity is not extended to * * *]; "or to any discussion or agreement among tanker or bulk bargo vessel owners or operators, even if such owners or operators carry chemical parcels in less than full shipload lots."

Alternatively, this clarification should be made in the Committee Report on S. 47.

*2. Effective date of agreement*

Under § 6(a), an agreement becomes effective within 45 days from filing unless rejected or suspended. While the Commission must transmit the agreement to the Federal Register within 10 days of its receipt, complaining parties may have little time to file a protest if the Federal Register fails to promptly publish the agreement. Moreover, the Commission will have little time to rule on the protest. Thus, the following addition should be made to § 6(a):

> "(a) EFFECTIVE DATE.—Except with respect to assessment agreements, each agreement filed under section 5 (a) shall become effective forty-five days after filing, unless rejected under section 5 (b) or suspended pursuant to subsection (b), *but in no case shall an agreement become effective in less than thirty days from its publication in the Federal Register.*

*Savings provisions*

There has been a general understanding that service contracts entered into prior to enactment of a Shipping Act reform bill would not have to comply with the new service contract requirements for twelve to eighteen months after enactment of a bill. Section 20(e)(1), which requires compliance by January 1, 1984, should be changed to reflect this.

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